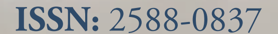
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QUITO, ECUADOR

2020

Centro de Publicaciones de la Pontificia Universidad Católica del Ecuador
Quito, Ecuador
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Unidad Coordinadora: Facultad de Jurisprudencia de la Pontificia Universidad Católica del Ecuador

EQUIPO EDITORIAL

1) EQUIPO DE GESTIÓN EDITORIAL

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Coordinador Editorial:

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Responsabilidades

El equipo de gestión editorial tiene a su cargo la Dirección/Coordinación Técnica de la RFJ y se encuentra conformado por:

1. El director/a editor/a
2. Las/los coordinadoras/es editoriales

El equipo de gestión editorial/técnica tiene a su cargo las labores de gestión y coordinación administrativa de los procesos editoriales de la Revista RFJ. No participa como evaluadoras/es y/o revisores/as, es decir, del proceso *blind peer review* (sistema de pares a <<doble ciego>>). Este proceso es llevado a cabo de forma exclusiva por los miembros del Consejo Editorial y del Comité Editorial y de Evaluadoras/es Externas/os (quienes son en todos los casos académicas/os y/o profesionales investigadoras/es con filiación externa a la PUCE). Su

responsabilidad es organizar el proceso de gestión administrativa de los textos remitidos a revista. Por lo tanto, ninguno de sus miembros es responsable de determinar el carácter de publicable de los artículos desde una perspectiva científica. Sin embargo, pueden someter al Consejo Editorial casos de infracción a las reglas de juego que orientan los procesos de la RFJ.

2) CONSEJO EDITORIAL

Miembros

Dr. Carlos Alberto Chinchilla Imbett, PhD. Profesor investigador titular de la Universidad del Externado (Bogotá, Colombia).

Dr. David Fabio Esborraz, PhD. Ricercatore, III livello (matricola n°. 9338), del Consiglio Nazionale delle Ricerche (CNR) con funzioni presso il Centro di Studi Giuridici Latinoamericani dell'Università degli Studi di Roma 'Tor Vergata'.

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Dra. Anabel Riaño Saad, PhD. Profesora investigadora titular de la Universidad del Externado (Bogotá, Colombia).

Dr. Carlos Soriano Cienfuegos, PhD. Profesor investigador de la Universidad Panamericana (México DF, México).

Responsabilidades

El Consejo Editorial tiene a su cargo supervisar el proceso editorial y la calidad científica de la Revista RFJ. En ese sentido, puede emitir recomendaciones orientadas a perfilar a la RFJ como un producto de excelencia internacional. De manera excepcional, sus miembros pueden participar como evaluadoras/es y/o revisores/as, es decir, del proceso *blind peer review* (sistema de pares a <<doble ciego>>). Sin embargo, su asignación (organizada a través del equipo de gestión editorial) se realiza dentro de lineamientos que apuntan a la total transparencia e imparcialidad. En caso de participar evaluadoras/es y/o revisores/as se

inhiben de realizar opiniones o funciones que puedan implicar afectación del código de ética de la revista y/o criterios establecidos por la PUCE, el CACES u otras entidades competentes. Son en todos los casos (100%), académicas/os-profesionales con filiación externa a la PUCE.

3) COMITÉ EDITORIAL Y DE EVALUADORAS/ES EXTERNAS/0S

Miembros Internacionales

Dr. Javier Coronel Zambrano, LLM.Socio del Estudio Jurídico Coronel & Cía.y docente de la Universidad Espíritu Santo (Guayaquil, Ecuador).

Dra. Silvana Esperanza Erazo Bustamante, PhD. Docente titular de la Universidad Técnica Particular de Loja. (Loja, Ecuador).

Dr. José Irigoyen Arboleda, PhD. Docente titular de la Universidad San Francisco de Quito (Quito, Ecuador).

Dra. Alegría Jijón Andrade, PhD. Docente de la Universidad de los Hemisferios y Estudio Peréz, Bustamante & Ponce (Quito, Ecuador).

Dra. María Alexandra López Paredes, Mgtr. Docente titular de la Universidad Técnica de Ambato (Ambato, Ecuador).

Dr. Juan Manuel Marchán Maldonado, LLM. Socio del Estudio Peréz, Bustamante & Ponce y docente de la Universidad San Francisco de Quito (Quito, Ecuador).

Dr. Andrés Martínez Moscoso, PhD. Docente titular de la Universidad de Cuenca (Cuenca, Ecuador).

Dra. Natalia Mora Navarro, PhD. Docente del IAEN (Quito, Ecuador).

Dra. Zaira Novoa Rodríguez, LLM. Docente del IAEN (Quito, Ecuador).

Dr. Roberto Passailaigue Baquerizo, PhD. Canciller de la Universidad ECOTEC (Guayaquil, Ecuador).

Dr. Hernán Pérez Loose, PhD. Socio del Estudio Coronel y Pérez y docente de la UEES (Guayaquil, Ecuador).

Dr. Pier Paolo Pigozzi Sandoval, LLM. Docente titular de la Universidad San Francisco de Quito (Quito, Ecuador).

Dra. Claudia Helena Salgado Levy, PhD. Docente titular de la Universidad San Francisco de Quito (Quito, Ecuador).

Dr. José Tomás Sánchez Jaime, PhD. Docente del IAEN (Quito, Ecuador).

Dr. Oswaldo Santos Dávalos, LLM. Docente de la Universidad San Francisco de Quito (Quito, Ecuador).

Dr. Jaime Vintimilla Saldaña, PhD. Docente titular de la Universidad San Francisco de Quito (Quito, Ecuador).

Evaluadores Externos

RESPONSABILIDADES DEL COMITÉ EDITORIAL Y DE LAS/LOS EVALUADORAS/ES Y/O EVALUADORAS/ES Y/O REVISORES/AS EXTERNAS/OS:

El Comité Editorial y de evaluadoras/es y/o c externas/os; en su condición de pares externos, cumplen con el rol de asegurar criterios de calidad en los contenidos y de objetividad en la selección y publicación, dentro del proceso editorial. Con este objeto se les atribuyen las siguientes responsabilidades:

1. Rol de revisores/as o arbitraje

Toda persona natural que se encarga de revisar de manera anónima, voluntaria, solidaria y profesional, según arreglo de las formas utilizadas en la academia, acepta valorar manuscritos con temas en los cuales tiene capacidad y competencia para emitir criterio experto. En todo momento, esta revisión y el dictamen seguirán las pautas establecidas por la revista RFJ, ajustándose a sus normas editoriales:

http://www.revistarfjpuce.edu.ec/index.php/rfj/about/submissions

2. Conflicto de intereses

En caso de existir un conflicto de intereses, de cualquier índole, las personas naturales con responsabilidades de revisión se comprometen a informar a la revista RFJ de inmediato, en cualquier momento del proceso y a rechazar su participación como revisor.

3. Confidencialidad

Las personas naturales con responsabilidades de revisión deben respetar el contenido de cada texto en proceso de arbitraje y lo mantendrán en condición confidencial durante todo el proceso editorial. En ese sentido, la RFJ emitirá reconocimientos/certificados una vez concluido el proceso editorial y publicado el número respectivo.

4. Retroalimentación

Toda crítica al artículo se realizará en forma anónima, objetiva, honesta y respetuosa para con el autor, quién podrá realizar las correcciones o ajustes correspondientes, según lo solicitado por la revista RFJ. En caso de no aceptar el arbitraje, el artículo será rechazado.

5. Modalidad de arbitraje

Los artículos emitidos por los autores son enviados a los pares revisores externos, bajo el sistema de *blind peer review* (sistema de pares a <<doble ciego>>). Este sistema de evaluación de los trabajos de investigación consiste en que al menos dos expertos (pudiendo ser más de dos de requerirlo el proceso de evaluación del texto) en la materia sobre la que tratan los evalúan y emiten un dictamen sobre la vialidad de la publicación.

6. Responsabilidades del Comité Editorial y de las/los Evaluadoras/es Externas/os

Junto con el Consejo Editorial, el Comité Editorial y de las/los Evaluadoras/es Externas/os vela por mantener el perfil académico de la revista en su ámbito de reflexión, en el objeto de estudio al cual responde y en relación con la audiencia a la cual se dirige.

7. Competencia

Junto con el Consejo Editorial, los miembros del Comité Editorial y de las/los Evaluadoras/es Externas/os, son los únicos responsables para determinar el carácter de publicable de los artículos desde una perspectiva científica.

Gestión ténico-administrativa de la revista

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* Docentes titulares de la Facultad de Arquitectura, Diseño y Artes (FADA-PUCE).

Srta. Rachel Romero Medina

Contacto: rcromero@puce.edu.ec

* Colaboradora principal de diagramación.

COPE - CÓDIGO DE CONDUCTA Y MEJORES PRÁCTICAS DIRECTRICES PARA EDITORES DE REVISTAS

Antecedentes / estructura

El Código de Conducta COPE para Editores de Revistas está diseñado para proveer de un conjunto de estándares mínimos al que se espera que todos los miembros de COPE se adhieran. Las Directrices sobre las *Mejores Prácticas* son más ambiciosas y se desarrollaron en respuesta a las peticiones de orientación por parte de los editores sobre una amplia gama de cuestiones éticas cada vez más complejas. Aunque cope espera que todos los miembros se adhieran al Código de Conducta para los Editores de Revistas (y considerará la presentación de reclamaciones contra los miembros que no lo hayan seguido), somos conscientes de que los editores pueden no ser capaces de implementar todas las recomendaciones de *Mejores Prácticas* (que son voluntarias), pero esperamos que nuestras sugerencias identifiquen aspectos en relación con la política y las prácticas de la revista que puedan ser revisados y discutidos.

En esta versión combinada de los documentos, las normas obligatorias que integran el Código de Conducta para los Editores de Revistas se muestran en letra redonda y con cláusulas numeradas; por otra parte, las recomendaciones en relación con las *Mejores Prácticas* aparecen en cursiva.

Deberes y responsabilidades generales de los editores

Los editores deben ser responsables de todo lo publicado en sus revistas. Esto significa que los editores deben:

1. Tratar de satisfacer las necesidades de los lectores y autores;

2. Esforzarse para mejorar constantemente su revista;

3. Establecer procesos para asegurar la calidad del material que publican;

4. Abogar por la libertad de expresión;

5. Mantener la integridad del historial académico de la publicación;

6. Impedir que las necesidades empresariales comprometan las normas intelectuales y éticas; y,

7. Estar siempre dispuesto a publicar correcciones, aclaraciones, retracciones y disculpas cuando sea necesario.

Las Mejores Prácticas para los editores incluirían las siguientes acciones:

- *Buscar activamente las opiniones de los autores, lectores, revisores y miembros del Consejo Editorial sobre cómo mejorar los procesos de la revista;*
- *Fomentar y conocer las investigaciones sobre la revisión por pares y publicar y reevaluar los procesos seguidos por la revista a la luz de estos nuevos hallazgos;*
- *Trabajar para persuadir al editor de la publicación para que proporcione los recursos apropiados, así como la orientación de expertos (por ejemplo, diseñadores, abogados);*
- *Apoyar iniciativas diseñadas para reducir las malas conductas en relación con la investigación y la publicación;*
- *Apoyar iniciativas para educar a los investigadores sobre la ética de las publicaciones;*
- *Evaluar los efectos de la política de la revista sobre el comportamiento del autor y del revisor y revisar las políticas, en caso necesario, para fomentar un comportamiento responsable y desalentar la puesta en práctica de malas conductas;*
- *Asegurar que los comunicados de prensa emitidos por la revista reflejan fielmente el mensaje del artículo sobre el que versan y ponerlos en contexto.*

Relaciones con los lectores

1. Se debe informar a los lectores sobre quién ha financiado la investigación u otro trabajo académico, así como sobre el papel desempeñado por el financiador, si este fuera el caso, en la investigación y en la publicación.

Las Mejores Prácticas para los editores incluirían las siguientes acciones:

- *Velar por que todos los informes y las revisiones de la investigación publicados hayan sido revisados por personal cualificado (incluyendo revisiones estadísticas cuando sean necesarias);*
- *Garantizar que las secciones no revisadas por pares de la revista están claramente identificadas;*

- *Adoptar procesos que fomenten la exactitud, integridad y claridad de los informes de investigación, incluida la edición técnica y el uso de directrices y listas de verificación apropiadas (por ejemplo,* miame*, consort);*

- *Considerar el desarrollo de una política de transparencia para fomentar la divulgación máxima de los artículos que no son de investigación;*

- *Adoptar sistemas de autoría o contribución que promuevan buenas prácticas, es decir, que reflejen quién realizó el trabajo y desmotiven la puesta en práctica de malas conductas (por ejemplo, autores fantasmas y autores invitados); y,*

- *Informar a los lectores sobre las medidas adoptadas para garantizar que las propuestas presentadas por los miembros del personal de la revista o del Consejo Editorial reciben una evaluación objetiva e imparcial.*

Relaciones con los autores

1. Las decisiones de los editores de aceptar o rechazar un documento para su publicación deben basarse en la importancia, originalidad y claridad del artículo, en la validez del estudio, así como en su pertinencia en relación con las directrices de la revista;

2. Los editores no revocarán las decisiones de aceptar trabajos a menos que se identifiquen problemas graves en relación con los mismos;

3. Los nuevos editores no deben anular las decisiones tomadas por el editor anterior de publicar los artículos presentados, a menos que se identifiquen problemas graves en relación con los mismos;

4. Debe publicarse una descripción detallada de los procesos de revisión por pares y los editores deben estar en disposición de justificar cualquier desviación importante en relación con los procesos descritos;

5. Las revistas deben tener un mecanismo explícito para que los autores puedan apelar contra las decisiones editoriales;

6. Los editores deben publicar orientaciones para los autores sobre todos aquellos aspectos que se esperan de ellos. Esta orientación debe actualizarse periódicamente y debe hacer referencia o estar vinculada al presente código;

7. Los editores deben proporcionar orientación sobre los criterios de autoría y / o quién debe incluirse como colaborador siguiendo las normas dentro del campo pertinente.

Las Mejores Prácticas para los editores incluirían las siguientes acciones:

- *Revisar las instrucciones de los autores regularmente y proporcionar enlaces a las directrices pertinentes (por ejemplo, icmje: Publicación de investigación responsable: Normas internacionales para los autores);*
- *Publicar intereses contrapuestos relevantes en relación con todos los colaboradores y publicar correcciones si dichos intereses se revelan tras la publicación ;*
- *Asegurar que se seleccionan revisores apropiados para los artículos presentados (es decir, individuos que pueden valorar el trabajo y no son capaces de rechazarlo por intereses contrapuestos);*
- *Respetar las peticiones de los autores de que un evaluador no revise su trabajo, siempre que estas estén bien razonadas y sean posibles;*
- *Guiarse por los diagramas de flujo de COPE (http:// publicationethics.org/ flowcharts) en casos de sospecha de mala conducta o de controversia en la autoría;*
- *Publicar información detallada sobre cómo se gestionan los casos de sospecha de mala conducta (por ejemplo, con vínculos al diagrama de flujo de COPE);*
- *Publicar las fechas de entrega y aceptación de los artículos.*

Relaciones con los revisores

1. Los editores deben proporcionar orientación a los revisores sobre todo lo que se espera de ellos, incluyendo la necesidad de manejar el material enviado en confianza con confidencialidad; esta orientación debe actualizarse periódicamente y debe hacer referencia o estar vinculada al presente código;
2. Los editores deben exigir a los revisores que revelen cualquier posible interés contrapuesto antes de revisar un trabajo;
3. Los editores deben contar con sistemas que garanticen la protección de las identidades de los revisores, a menos que utilicen un sistema abierto de revisión, del que han sido informados tanto los autores como los revisores.

Las Mejores Prácticas para los editores incluirían las siguientes acciones:

- *Alentar a los revisores a realizar comentarios sobre cuestiones éticas y posibles acciones de mala conducta en relación con la investigación y la publicación identificadas en los trabajos presentados (por ejemplo, diseño de investigación poco ético, detalles insuficientes sobre el consentimiento de los pacientes del*

estudio o sobre la protección de los sujetos de la investigación incluidos los animales-, manipulación y presentación inadecuada de los datos, etc.);

- *Animar a los revisores a realizar comentarios sobre la originalidad de los trabajos presentados y a estar alerta de las posibles publicaciones repetidas y del plagio;*
- *Considerar la posibilidad de proporcionar a los revisores herramientas para detectar publicaciones relacionadas (por ejemplo, vínculos a referencias citadas y búsquedas bibliográficas);*
- *Enviar los comentarios de los revisores a los autores en su totalidad a menos que sean ofensivos o difamatorios;*
- *Favorecer el reconocimiento de la contribución de los revisores a la revista ;*
- *Alentar a las instituciones académicas a reconocer las actividades de revisión por pares como parte del proceso académico;*
- *Realizar un seguimiento de la labor desempeñada por los evaluadores y tomar medidas que aseguren un proceso de alta calidad;*
- *Desarrollar y mantener una base de datos de revisores adecuados y actualizarla en función del rendimiento de los mismos;*
- *Dejar de enviar trabajos a revisores que emiten, de forma constante, críticas carentes de educación, de mala calidad o fuera de plazo;*
- *Asegurar que la base de datos de revisores es un reflejo de la comunidad académica para la revista y añadir nuevos revisores si resulta necesario;*
- *Utilizar una amplia gama de fuentes (no solo contactos personales) para identificar nuevos posibles revisores (por ejemplo, sugerencias de los autores, bases de datos bibliográficas);*
- *Seguir el diagrama de flujo de COPE en casos de sospecha de mala conducta por parte del revisor.*

Coordination Unit: Facultad de Jurisprudencia de la Pontificia Universidad Católica del Ecuador

EDITORIAL COMMITTEE

1) Editorial Management Team

Management / Technical Coordination:

Facultad de Jurisprudencia de la Pontificia Universidad Católica del Ecuador.

Contact: rfj@puce.edu.ec

Director and/or Editor:

Dr. Rubén Carlos Braulio Méndez Reátegui, PhD – Dsc

Contact: rcmendez@puce.edu.ec

Editorial Coordinator:

Dr. Ivonne Tellez Patarroyo

Contact: itellez783@puce.edu.ec

Editorial Coordinator:

Mg. Gonzalo Lascano Báez

Contact: gglascano@puce.edu.ec

EDITORIAL MANAGEMENT TEAM

RESPONSIBILITIES

The editorial management team is in charge of the Direction/Technical Coordination of the RFJ and is made up of:

a) The director/editor

b) The editorial coordinators

The editorial/technical management team is in charge of the management and administrative coordination of the editorial processes of the RFJ Magazine. It does not participate as evaluators and/or reviewers, that is, in the blind peer-review process (double-blind peer system). This process is carried out exclusively by the members of the Editorial Board and the Editorial Committee and External Evaluators (who are in all cases academic and/or professional researchers with external affiliation to PUCE). Her responsibility is to organize the administrative management process of the texts sent to the magazine. Therefore, none of its members is responsible for determining the publishable nature of articles from a scientific perspective. However, they may submit to the Editorial Board cases of infringement of the rules of the game that guide the RFJ processes.

2) Editorial Board

Members

Responsibilities

The Editorial Board is in charge of supervising the editorial process and the scientific quality of the RFJ Magazine. In this sense, it can issue recommendations aimed at profiling the RFJ as a product of international excellence. Exceptionally, its members can participate as evaluators and/or reviewers, that is, in the blind peer-review process ("double-blind" peer system). However, its allocation (organized through the editorial management team) is carried out within guidelines that aim at full transparency and impartiality. In the event that evaluators and/or reviewers participate, they are inhibited from making opinions or functions that may imply affectation of the journal's code of ethics and/or criteria established by PUCE, CACES, or other competent entities. They are in all cases (100%), academic/professionals with external affiliation to PUCE.

3) Editorial and External Evaluators Commitee:

International Members

Dra. Isabel Cristina Jaramillo Sierra, PhD. Profesora titular principal de la Universidad de los Andes - Facultad de Derecho (Bogotá, Colombia).

Dr. Jorge Andrés Larroucau Torres, PhD. Profesor titular de la Pontificia Universidad Católica de Valparaíso (Valparaíso, Chile).

Dr. Rhett B. Larson, JD. Professor at Arizona State University (Arizona, Estados Unidos).

Dr. Patricio Lazo González, PhD. Profesor de la Pontificia Universidad Católica de Valparaíso (Valparaíso, Chile).

Professor Brian Leiter, PhD. Karl N. Llewellyn Professor of Jurisprudence, Director, Center for Law, Philosophy & Human Values, University of Chicago (Chicago, Estados Unidos).

Dr. Carlos Lema Devesa, PhD. Catedrático de la Universidad Complutense de Madrid (Madrid, España).

Dr. Cris Robert Lingle, PhD. Profesor de la Universidad Francisco Marroquin (Guatemala, Guatemala).

Dr. Alfredo Liñán Lafuente, PhD. Profesor de la Universidad Complutense de Madrid (Madrid, España).

Dr. Iván Llamazares Valduvieco, PhD. Catedrático de la Universidad de Salamanca (Salamanca, España).

Dra. Daniela Malapi Hernández, LLM. Docente principal y Directora de la Carrera de Derecho de la UTP (Lima, Perú).

Dr. Rodrigo Andrés Momberg Uribe, PhD. Profesor de la Pontificia Universidad Católica de Valparaíso (Valparaíso, Chile).

Dra. Claudia Carolina Mejías Alonzo, PhD. Profesora titular de la Pontificia Universidad Católica de Valparaíso (Valparaíso, Chile).

Dr. Daniel Monroy Celi, LLM. Docente titular (investigador) del Departamento de Derecho Económico de la Universidad del Externado (Bogotá, Colombia).

Dr. Rómulo Morales Hervías, PhD. Docente titular de la Pontificia Universidad Católica del Ecuador (Lima, Perú).

Dr. Claudio Andrés Muñoz Naveas, LLM. Profesor titular de la Universidad Andrés Bello (Santiago de Chile, Chile).

Dr. Alberto Muñoz Villarreal, PhD. Profesor de la Universidad Autónoma de Madrid (Madrid, España).

Dr. Alfredo Muñoz García, PhD. Profesor del Departamento de Derecho Mercantil y Director Adjunto y Coordinador del Máster Universitario en Acceso a la Profesión de Abogado de la Universidad Complutense de Madrid (Madrid, España).

RESPONSIBILITIES OF THE EDITORIAL COMMITTEE AND THE EVALUATORS AND/OR EXTERNAL REVIEWERS:

The Editorial Committee and the evaluators and/or external reviewers; As external peers-reviewers perform the role of ensuring quality criteria in content and objectivity in selection and publication, within the editorial process. For this purpose, the following responsibilities are attributed to them:

1. Role of reviewers or arbitration

Any natural person who is in charge of reviewing anonymously, voluntarily, in solidarity and professionally, according to the forms used in the academy, agrees to assess manuscripts with topics in which they have the capacity and competence to issue an expert judgment. At all times, this review and the opinion will follow the guidelines established by the RFJ magazine, adjusting to its editorial standards:

http://www.revistarfjpuce.edu.ec/index.php/rfj/about/submissions

2. Conflict of interest

In the event of a conflict of interest of any kind, natural persons with review responsibilities undertake to inform RFJ magazine immediately, at any point in the process, and to reject their participation as a reviewer.

3. Confidentiality

Natural persons with review responsibilities must respect the content of each text in the process of arbitration and will keep it confidential throughout the editorial process. In this sense, the RFJ will issue acknowledgments once the editorial process has been completed and the respective number has been published.

4. Feedback

Any criticism of the article will be made anonymously, objectively, honestly, and respectfully towards the author, who will be able to make the corresponding corrections or adjustments, as requested by the RFJ magazine. In case of not accepting the arbitration, the article will be rejected.

5. Arbitration modality

The articles issued by the authors are sent to the external peer reviewers, under the blind peer review system ("double blind peer system"). This system for evaluating research papers consists of at least two experts (the text evaluation process may be more than two if required) in the subject on which they are evaluated and they issue an opinion on the viability of the publication. .

6. Responsibilities of the Editorial Committee and the External Evaluators

Together with the Editorial Board, the Editorial Committee and the External Evaluators ensure the academic profile of the journal in its field of reflection, in the object of study to which it responds and in relation to the audience to which is directed.

7. Competition

Together with the Editorial Board, the members of the Editorial Committee and the External Evaluators are solely responsible for determining the publishable nature of the articles from a scientific perspective.

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COPE CODE OF CONDUCT AND BEST PRACTICES GUIDELINES FOR JOURNAL EDITORS

Background / structure

The COPE Code of Conduct for Journal Editors is designed to provide a set of minimum standards to which all COPE members are expected to adhere. The Best Practice Guidelines are more ambitious and were developed in response to editors' requests for guidance on a wide range of increasingly complex ethical issues. Although cope expects all members to adhere to the Code of Conduct for Journal Editors (and will consider filing complaints against members who have not followed it), we are aware that publishers may not be able to implement all recommendations. Best Practices (which are voluntary), but we hope that our suggestions identify aspects of the journal's policy and practices that can be reviewed and discussed.

In this combined version of the documents, the mandatory standards that make up the Code of Conduct for Journal Editors are shown in round type and with numbered clauses; on the other hand, recommendations regarding Best Practices appear in italics.

General duties and responsibilities of publishers

Editors must be responsible for everything published in their Journals. It means that publishers must:

1. Try to meet the needs of readers and authors;

2. Strive to improve the journal continually;

3. Establish processes to ensure the quality of the material they publish;

4. Advocate for freedom of expression;

5. Maintain the integrity of the publication's academic record;

6. Prevent business needs from compromising intellectual and ethical standards; and,

7. Always be willing to publish corrections, clarifications, retractions, and apologies when necessary.

Best Practices for publishers would include the following actions:

- Actively seek the opinions of the authors, readers, reviewers and members of the Editorial Board on how to improve the journal processes;
- Promote and learn about research on peer review and publish and re-evaluate the processes followed by the journal in light of these new findings;
- Work to persuade the publisher of the publication to provide appropriate resources as well as expert guidance (e.g., designers, lawyers);
- Support initiatives designed to reduce misconduct in relation to research and publication;
- Support initiatives to educate researchers about the ethics of publications;
- Evaluate the effects of the journal's policy on the behavior of the author and the reviewer and review the policies, if necessary, to encourage responsible behavior and discourage the implementation of misconduct;
- Ensure that the press releases issued by the Journal faithfully reflect the message of the article they are about and put them in context.

Relations with readers

1. Readers should be informed of who has funded the research or other academic work, as well as the role, if any, of the funder in research and publication.

Best Practices for publishers would include the following actions:

- Ensure that all published research reports and reviews have been reviewed by qualified personnel (including statistical reviews when necessary);
- Ensure that the non-peer-reviewed sections of the journal are clearly identified;
- Adopt processes that promote the accuracy, completeness, and clarity of research reports, including technical editing and the use of appropriate guidelines and checklists (e.g., miame, consort);
- Consider developing a transparency policy to encourage maximum disclosure of non-research articles;
- Adopt authorship or contribution systems that promote good practices, that is, that reflect who did the work and discourage the implementation of misconduct (for example, ghostwriters and guest authors); and,
- Inform readers of the measures taken to ensure that proposals submitted by staff members of the Journal or Editorial Board receive an objective and impartial evaluation.

Relations with authors

1. Editors’ decisions to accept or reject a document for publication must be based on the importance, originality, and clarity of the article, on the validity of the study, as well as on its relevance in relation to the journal’s guidelines;

2. Editors will not reverse decisions to accept papers unless serious problems are identified in connection therewith;

3. New editors should not override decisions made by the previous editor to publish submitted articles unless serious issues are identified in relation to them;

4. A detailed description of the peer review processes should be published and the editors should be able to justify any significant deviations from the described processes;

5. Journals must have an explicit mechanism for authors to appeal against editorial decisions;

6. Editors should publish guidelines for authors on all aspects that are expected of them. This guidance must be regularly updated and must refer to or be linked to this code;

7. Editors should provide guidance on authorship criteria and/or who should be included as a contributor following standards within the relevant field.

Best Practices for publishers would include the following actions:

- Review authors' instructions regularly and provide links to relevant guidelines (eg icmje5, Responsible Research Publication: International Standards for Authors);
- Post relevant conflicting interests in relation to all contributors and post corrections if those interests are revealed after posting;
- Ensuring that appropriate reviewers are selected for the articles submitted (ie, individuals who can value the work and are unable to reject it for competing interests);
- Respect the authors' requests that an evaluator does not review their work, provided they are well reasoned and possible;
- Be guided by COPE flow charts (Http: // publicationethics.org/flowcharts) in cases of suspected misconduct or controversy in authorship;
- Publish detailed information on how suspected misconduct cases are handled (for example, with links to the COPE flow diagram);
- Publish the delivery and acceptance dates of the articles.

Relations with reviewers

- Editors should provide guidance to reviewers on what is expected of them, including the need to handle confidentially submitted material with confidence; this guidance should be regularly updated and should refer to or be linked to this code;
- Editors should require reviewers to disclose any potential conflicting interests before reviewing a paper;
- Editors should have systems in place to ensure the protection of reviewers' identities unless they use an open review system, which both authors and reviewers have been informed of.

Best Practices for publishers would include the following actions:

- Encourage reviewers to comment on ethical issues and possible misconduct actions in relation to the research and publication identified in the papers presented (eg unethical research design, insufficient details on the consent of study patients, or on the protection of research subjects, including animals, inappropriate handling and presentation of data, etc.);

- Encourage reviewers to comment on the originality of papers submitted and to be alert to possible repeat posts and plagiarism;

- Consider providing reviewers with tools to detect related publications (for example, links to cited references and bibliographic searches);

- Send the reviewers' comments to the authors in their entirety unless they are offensive or defamatory;

- Promote recognition of the contribution of the reviewers to the journal;

- Encourage academic institutions to recognize peer review activities as part of the academic process;

- Monitor the work of the evaluators and take measures that ensure a high-quality process;

- Develop and maintain a database of appropriate reviewers and update it based on their performance;

- Stop submitting papers to reviewers who consistently issue uneducated, poor-quality, or late reviews;

- Ensure that the reviewer database is a reflection of the academic community for the journal and add new reviewers if necessary;

- Use a wide range of sources (not just personal contacts) to identify new potential reviewers (eg, authors' suggestions, bibliographic databases);

- Follow the COPE flow chart in cases of suspected misconduct by the reviewer.

AVISO LEGAL

En atención del amparo legal que brinda el Art. 118 del Código Orgánico de la Economía Social de los Conocimientos, Creatividad e Innovación (Código Ingenios) del número 1 al número 6 de la revista se ha respetado el formato original de los documentos/artículos remitidos.

Esta revista se adscribe dentro de las actividades jurídico-investigativas realizadas por la Facultad de Jurisprudencia de la Pontificia Universidad Católica del Ecuador.

CUOTA DE GÉNERO

De manera transversal para todos sus órganos, procesos y productos/ secciones, la RFJ intenta que esta no se sitúe por debajo del 25%.

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EDITORIAL

La Revista Facultad de Jurisprudencia de la Pontificia Universidad Católica del Ecuador (RFJ) es una publicación científica continua y semestral (Enero-Junio) (Julio-Diciembre) publicada por el Centro de Publicaciones y bajo el auspicio de la Dirección de Investigación de la Universidad. La modalidad de publicación continua cierra el 30 de junio y el 31 de diciembre de cada año. Sin embargo, la RFJ se encuentra abierta a recibir artículos a lo largo de todo el año. Su énfasis es el ámbito de lo jurídico y (entendido *prima facie* en un sentido teórico) su relación con otras disciplinas, saberes y ciencias. Puede utilizar el sistema de "especiales temáticos" en cualquiera de sus convocatorias.

En su segunda época, constituye un homenaje a la Revista inicial, publicada en 1999 y es resultado del invalorable apoyo recibido por parte del Dr. Íñigo Salvador Crespo y el Dr. Efrén Guerrero Salgado, ex decanos de la Facultad de Jurisprudencia, quienes, durante todo el proceso, actuó decididamente para facilitar las condiciones que permitieron el resurgimiento de la revista. A ellos debemos la portada y la aprobación final por parte de las unidades competentes que hicieron posible esta edición. La RFJ se edita en castellano, inglés, francés, italiano y portugués. Aborda temas desde una perspectiva exegética, multi y transdisciplinar. Por lo tanto, está dedicada al análisis crítico de la problemática nacional e internacional del Derecho en todas sus áreas. Incluye artículos de científico-jurídicos, revisiones, análisis de actualidad, investigaciones, recensiones de libros, notas de investigación, notas de revisión, informes, miscelánea y traducciones originales.

La propuesta editorial de la RFJse encuentra en el marco de la misión de la PUCE, y busca contribuir de un modo riguroso y crítico, a la tutela y desarrollo del Estado de Derecho, la dignidad humana y de la herencia cultural, mediante la investigación, la docencia y los diversos servicios ofrecidos a las comunidades locales, nacionales e internacionales.

El Consejo Editorial y de evaluadores externos está integrado por destacados académicos de las ciencias sociales de diferentes Universidades de Latinoamérica, Europa, Estados Unidos y Oceanía. Estos de forma conjunta al Equipo de Gestión Editorial conforman el Comité Editorial de la RFJ.

La Revista está abierta a la recepción de artículos durante todo el año, dentro de las fechas límites de cada uno de los números. Los documentos recibidos y seleccionados para publicación cumplirán con el sistema de revisión anónima por el sistema de «doble ciego» y las pautas reglamentarias establecidas.

Finalmente, se invita a todos los docentes e investigadores a que participen y compartan con nosotros futuras contribuciones.

Dirección Revista RFJ

A la Pontificia Universidad Católica del Ecuador

AGRADECIMIENTO Y PRESENTACIÓN

La Pontificia Universidad Católica del Ecuador como *alma mater* del conocimiento de las diversas disciplinas del saber, consciente que el núcleo fundamental de nuestra vivencia académica es la investigación y, por lo tanto, la promoción de espacios de participación para la producción científica, agradece:

Al equipo de investigación y publicaciones de la Facultad de Jurisprudencia. Al equipo de asistencia editorial conformado por Lissangee Stefanía Mendoza García, Rachel Carolina Romero Medina, Mariana Lozada Mondragón y Amparo Álvarez Meythaler.

A los revisores que actúan como pares ciegos verificadores de contenido y los lineamientos generales investigativos de la revista y la formulación y acoplamiento técnico de su estructura. A los autores que con su activa colaboración permiten el desarrollo de una investigación integral en el ámbito de la ciencia jurídica.

A la Dirección de Investigación y al Centro de Publicaciones por su invalorable apoyo durante el proceso de establecimiento y consolidación de la RFJ.

La RFJ representa un aporte original, fruto del trabajo coordinado de los miembros de la Facultad de Jurisprudencia de la Pontificia Universidad Católica del Ecuador y prestigiosos académicos internacionales.

El proyecto editorial surge a partir de la iniciativa de la Facultad de Jurisprudencia que con gran dedicación generó el espacio propicio de interacción y colaboración científica, que facilitó el arduo proceso de elaboración documental que esta publicación conllevará. Asimismo, la exhaustiva revisión y aprobación por parte de pares externos no se puede dejar sin mención.

Por lo tanto, se puede concluir que la RFJ introduce un elevado grado de originalidad y trascendencia para la literatura jurídica nacional e internacional y favorece a la sociedad ecuatoriana en su conjunto. En ese sentido, debo reiterar que, a través de esta revista, la Pontificia Universidad Católica del Ecuador y su Facultad de Jurisprudencia contribuye de modo incólume, con el progreso en la enseñanza del Derecho como disciplina científico-humanista.

Dr. Mario Melo Cevallos
Decano de la Facultad de Jurisprudencia
Pontificia Universidad Católica del Ecuador

ARTÍCULOS

SUMARIO DE LA REVISTA

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Pandemia de COVID-19: una nueva evidencia de la necesaria reforma legal para la niñez ecuatoriana

Pandémie de COVID-19: une nouvelle preuve de la réforme juridique nécessaire pour les enfants équatoriens

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RESUME: La pandémie provoquée par le COVID-19 a mis en évidence certaines situations telles que le manque d'un régime obligatoire de communication entre enfants et parents, qui obligent le législateur équatorien à adopter d'urgence la réforme de certaines lois que le Code de l'enfance et de l'adolescence maintient au sujet du « régime de visites », afin d'éviter l'effondrement du système judiciaire en matière d'enfance.

MOTS CLES: libre circulation, communication, droit de la famille, enfance, réforme juridique.

RESÚMEN: La pandemia provocada por COVID-19 ha puesto de manifiesto ciertas situaciones, como la falta de un régimen obligatorio de comunicación entre niños y padres, que obligan a los legisladores ecuatorianos a adoptar urgentemente la reforma de ciertas leyes que el Código de la Niñez y Adolescencia mantiene en relación con el "régimen de visitas", a fin de evitar el colapso del sistema de justicia en materia de infancia.

PALABRAS CLAVE: Libre circulación, comunicación, derecho de la familia, niñez, reforma jurídica.

INTRODUCTION

La pandémie de COVID-19, qui affecte le monde depuis la fin de l'année 2019, au-delà de la maladie et de la mort, est devenue une opportunité pour la réflexion afin d'opérer des changements profonds dans tous les domaines.

Dans ces domaines, la science du Droit, chargée de la régulation du comportement humain, intégrera des changements importants dans la réglementation, dont notre pays ne peut rester à l'écart, car des lacunes qui, avant le COVID-19, pouvaient être ignorées, se manifestent aujourd'hui dans toute leur ampleur et génèrent de plus grands conflits juridiques.

1. DROIT / OBLIGATION DE RELATION

1.1. Cadre Conceptuel

Le « droit à la relation » susmentionné est répertorié comme un droit de l'homme et fondamental, étant donné qu'il est prévu dans la Convention relative aux droits de l'enfant (1989), traité international ratifié et contraignant pour notre pays, dont l'article 9.3 dispose que :

> Les Etats parties respectent le droit de l'enfant séparé de ses deux parents ou de l'un d'eux d'entretenir régulièrement des relations personnelles et des contacts directs avec ses deux parents, sauf si cela est contraire à l'intérêt supérieur de l'enfant.

Ainsi, il est obligatoirement incorporé dans le système juridique équatorien, en vertu de ce qui est indiqué à l'article 425 de la Constitution équatorienne (2008) en vigueur, qui dispose textuellement que:

> L'ordre hiérarchique d'application des règles sera le suivant: la Constitution; traités et conventions internationaux; lois organiques; lois ordinaires; normes régionales et ordonnances de district; décrets et

> règlements; ordonnances; accords et résolutions; et les autres actes et décisions des pouvoirs publics.

Plus précisément, la Constitution équatorienne indique que les enfants et les adolescents font partie des groupes d'attention prioritaires et, pour ce sujet en particulier, déclare:

> Art. 45.- Les filles, garçons et adolescents jouiront des droits communs de l'être humain, en plus de ceux spécifiques à leur âge. L'État reconnaîtra et garantira la vie, y compris les soins et la protection dès la conception.
>
> Les filles, les garçons et les adolescents ont droit à l'intégrité physique et mentale; à leur identité, nom et citoyenneté; à une santé et une nutrition complètes; à l'éducation et à la culture, aux sports et aux loisirs; à la sécurité sociale*; d'avoir une famille et de profiter de la coexistence familiale et communautaire*; à la participation sociale; au respect de leur liberté et de leur dignité; d'être consultés sur les questions qui les concernent; d'être éduqués en priorité dans leur langue et dans les contextes culturels de leurs peuples et nationalités; et *de recevoir des informations sur leurs parents ou proches absents, à moins que cela ne nuise à leur bien-être*.
>
> L'Etat garantira leur liberté d'expression et d'association, le libre fonctionnement des conseils étudiants et autres formes associatives. (les italiques soulign*és* nous appartiennent) (CRE, 2008, art. 45)

De ce qui précède, il s'ensuit que ce droit doit être inclus dans l'ordre juridique; cependant, bien qu'il ait été incorporé dans notre pays, ce droit est incomplètement réglementé, et seulement dans l'une de ses facettes, littéralement comme un «régime de visite», malgré le fait que, grâce à la Convention relative aux droits de l'enfant, qui consacre la doctrine de la protection intégrale qui rend les enfants visibles en tant que véritables sujets de droits, sa réglementation devrait être élargie pour s'accorder plus précisément au droit de relation.

Comment définir le «régime de visite»? L'auteur Enrique Varsi (2004) indique à cet égard que:

> Il peut être défini comme une relation juridique familiale de base qui est identifiée à un droit-devoir d'avoir une communication adéquate entre parents et enfants (et vice versa) lorsqu'il n'y a pas de cohabitation permanente entre eux. (p. 261)

Dans le cadre d'une protection intégrale, elle sert ainsi à garantir le droit à la famille, puisque les enfants et les adolescents ont le droit d'avoir une famille, de la connaître et, en général, de jouir de la coexistence familiale. Ceci est établi dans le Code équatorien de l'enfance et de l'adolescence, dans le deuxième livre intitulé : « Le garçon, la fille et l'adolescent dans leurs relations familiales », et plus précisément dans le deuxième titre qui se réfère à l'autorité parentale, définie par la doctrine comme:

> L'attribut des parents qui doivent protéger et prendre soin de la personne et des biens de leurs enfants; en règle générale, il est exercé conjointement par les deux parents et, surtout, individuellement par le père ou la mère à qui la garde est accordée. (Varsi Rospigliosi, 2018, p. 376)

L'exercice de l'autorité parentale est toujours conjoint entre les parents, sauf décision contraire du tribunal; mais l'essentiel de celle-ci, sa moelle épinière, la garde, qui dans notre pays est encore appelée « possession », à défaut d'accord entre les parents, selon notre législation, ne peut être attribuée qu'à l'un d'eux (Code de l'enfance et de l'adolescence, 2003, article 106). Le parent non gardien, pour sa part, est un «bénéficiaire» de ce que nous appelons «droit de visite». Métaphoriquement, nous pourrions expliquer la garde comme la planète la plus importante de celles qui composent le système solaire de l'autorité parentale, accompagnée d'une autre planète indispensable, le régime de visite.

1.2. VERS UNE RÉFORME JURIDIQUE

1.2.1. Le point de départ: la terminologie

À cet égard, à première vue, il est évident que toute réforme juridique devrait commencer par renommer ce droit dans la législation équatorienne. Il faut l›énoncer comme un droit de relation, car sous le nom actuel, le parent non gardien semble occuper la place d›un visiteur qui, s›il n›est pas «invité» à faire partie de la vie quotidienne de son enfant, ne peut tout simplement pas exercer son droit. Cependant, ce n'est que la première carence de certaines lacunes que la loi contient en la matière, comme on le verra plus loin.

Si le problème de la terminologie peut sembler superficiel, il s'avère qu'il s'agit de la preuve la plus palpable de la législation en la matière dépassée mais en vigueur en Équateur, car le Code de l'enfance et de l'adolescence, dans les quatre articles qu'il consacre à ce sujet, n'envisage même pas la possibilité qu'un régime de communication soit établi pour le parent non gardien ; ainsi le juge équatorien comprend littéralement qu'il ne doit garantir que des «visites» personnelles.

1.2.2. Droit de communication

Le problème précédent est devenu plus visible lors de la pandémie de COVID-19 et se poursuivra, très probablement, après la fin de la « quarantaine », l'isolement familial obligatoire décrété par les autorités à titre préventif, que le gouvernement équatorien a décidé de classer par phases qui impliquent principalement une restriction de la libre circulation des véhicules, qu'il a appelée, par analogie avec les feux de signalisation, peut-être pour mieux la faire comprendre: « feu rouge » ou quarantaine stricte, « feu orange » ou quarantaine atténuée et « feu vert » ou fin de quarantaine.

Le vide réglementaire concernant la communication parentale-filiale atteint également l'actuel projet de loi de réforme sur les enfants et les adolescents, appelé « Projet de

code organique pour la protection complète des filles, des garçons et des adolescents », qui unifie certaines initiatives de réforme réglementaire et qui fait l'objet d'un débat au sein de l'Assemblée Nationale, mais dans lequel les moyens télématiques n'ont pas été inclus pour maintenir le lien familial, ce qui n'a aucun sens dans le contexte actuel: nous avons tous assisté au raccourcissement des distances grâce aux plateformes virtuelles, des appels vidéo et même des simples appels téléphoniques, car bien qu'ils ne remplacent pas le contact physique du parent qui ne peut pas embrasser son enfant, ils lui permettent au moins d'être informé de sa situation, et de même l'enfant peut rester informé sur la vie et les routines de son parent.

Cela devient d'autant plus incompréhensible si l'on considère que l'Équateur est un pays dans lequel l'accès général à Internet a augmenté, de même que l'utilisation du téléphone portable, car:

> L'Équateur a atteint en moyenne 79% d'accès de la population à Internet, chiffre qui prend en compte des aspects d'accès mais pas uniquement à partir de comptes ou de services d'Internet sous contrat. Le volume de ce chiffre est justifié par le nombre de lignes actives de téléphone portable qui, avec les initiatives gouvernementales d'accès dans les espaces publics et l'offre de fournisseurs de services mobiles aux coûts de plus en plus bas, rapproche l'accès à de plus en plus d'utilisateurs. Malgré le fait que la principale concentration d'utilisateurs se situe dans les villes de Guayaquil et Quito, les utilisateurs augmentent dans toutes les provinces et villes du pays par rapport aux années précédentes. (Del Alcazar Ponce, 2020)

De même, en 2020, l'on calcule que 15,6 millions d'Équatoriens possèdent des lignes de téléphone portable (Telesemana, 28 juin 2019), ce qui représente 89% de l'ensemble de la population et démontre l'utilité d'intégrer le régime de communication parento-filiale dans la législation. Dans cette quarantaine, ou dans tout autre cataclysme, le droit d'avoir des relations avec le parent non gardien et la famille élargie, peut ainsi être garanti.

Il convient de se rappeler que, pour ne pas limiter l'exercice du droit commenté, il est essentiel de comprendre qu'il s'agit d'un droit corrélatif tant pour les enfants et adolescents que pour les parents; cependant, il est souvent considéré à tort comme «bénéfique» uniquement pour le parent non gardien. Cependant, rien n'est plus éloigné de la réalité: plusieurs études ont demontré l'importance du rôle paternel dans l'adaptation et la réussite des enfants dans les systèmes éducatifs et dans l'environnement social. Ainsi, par exemple:

> Kliksberg (2000) étudie la situation sociale en Amérique Latine et ses impacts sur la structure familiale. En comparant la situation dans les pays développés et dans les pays en développement, il a réussi à observer comment la situation sociale exerce une grande influence sur la famille. Il fait référence à une étude réalisée aux États-Unis (Wilson, 1994) dans laquelle 60.000 enfants ont été étudiés, où l'on a constaté que pour les deux sexes et à presque tous les niveaux sociaux, sauf le plus élevé, sans distinction de race, les enfants vivant avec une mère séparée ou divorcée avaient des conditions pires que les enfants vivant avec les deux parents biologiques. *Ainsi, ceux qui vivaient sans le père avaient tendance à être plus fréquemment expulsés des établissements d'enseignement auxquels ils appartenaient, à souffrir de troubles du comportement et à éprouver des difficultés dans les relations avec leurs camarades.* Dans des études menées en Uruguay (Katzman, 1997), il a été possible de voir ce type d'implication plus au niveau physiologique ... Dans cette même publication (Kliksberg, 2000) décrit une autre étude réalisée aux États-Unis (Dafoe Whitehead, 1993) axée sur la population des centres de détention pour mineurs, *où il a été reconnu qu'en ce qui concerne la situation familiale, 70% de ces jeunes venaient de familles dont le père était absent.* (Rodríguez Martínez, 2010, pp. 4-5) (les italiques soulignés nous appartiennent)

Ainsi, nous sommes d'accord avec les auteurs qui soulignent la dualité du droit à la relation, en tant qu'un droit-devoir (Barcia Lehmann, 2018, pp. 49-72), un exercice de «circulation à double sens», que l'on peut comparer aux deux faces d'une pièce de monnaie: d'un côté, c'est le droit qui appartient à l'enfant qui est lié à son père ou sa mère avec le devoir corrélatif émanant de la faculté pour son parent non gardien; et, de l'autre côté, le droit du parent de rester en contact avec son enfant mineur, d´être pleinement conscient de sa vie et de ses habitudes, de contribuer au développement de sa santé physique et mentale. Cette faculté s›étend à la famille élargie du dit parent, comme le prévoit l'actuel Code de l'enfance et de l'adolescence (2003) à l'article 124, c'est-à-dire les grands-parents, oncles, frères et parents jusqu'au quatrième degré de consanguinité (cousins).

Les parents ont le devoir d'éduquer et prendre soin de leurs enfants, droit qui dans le cas du parent non gardien, est rendu possible grâce au droit de relation qui put être affecté pendant la pandémie du COVID-19. Ainsi, de nombreux parents non gardiens étaient chargés d'aider leurs enfants avec leurs devoirs, tels que l'apprentissage d'une autre langue qu'eux seuls parlaient, et s'ils étaient empêchés d'exercer ce rôle physiquement, ils durent avoir recours aux moyens télématiques, à condition que les accords le permissent, de telle sorte que le droit d'apprendre de leurs enfants fût ainsi garanti.

1.2.3. Autonomie progressive

Bien entendu, pour l'exercice correct du droit de relation, les opinions des fils et des filles doivent toujours être écoutées, afin d'établir les dates et les heures du régime des visites, compte tenu de leurs habitudes, dans le contexte de la « démocratisation de la famille » que nous appliquons aux enfants post-Convention [1], dont on consulte toujours l'opinion

1 Nous nous référons ainsi aux enfants nés en Équateur à partir de 1990, lorsque nous avons ratifié la Convention relative aux droits de l'enfant, qui a changé le paradigme juridique pour traiter les enfants et les adolescents comme de véritables sujets de droits, avec l'application de la doctrine de la protection intégrale qui a marqué un virage à 180 degrés dans le système juridique équatorien.

en fonction de leur degré de développement, sur toutes les questions qui les concernent, comme l'indique la Convention relative aux droits de l'enfant (1990) précitée à l'article 12:

> 1. Les Etats parties garantissent à l'enfant qui est capable de discernement *le droit d'exprimer librement son opinion sur toute question l'intéressant*, les opinions de l'enfant étant dûment prises en considération en égard à son âge et à son degré de maturité.
> 2. A cette fin, on donnera notamment à l'enfant *la possibilité d'être entendu dans toute procédure judiciaire ou administrative l'intéressant*, soit directement, soit par l'intermédiaire d'un représentant ou d'une organisation appropriée, en concordance avec les règles de procédure de la législation nationale. (les italiques soulignés nous appartiennent)

L'on retrouve des dispositions semblables à l'article 45 susmentionné de la Constitution équatorienne et à l'article 60 de l'actuel Code de l'enfant:

> Article 60.- Droit d'être consulté.- Les enfants et adolescents ont le droit d'être consultés sur toutes les questions qui les concernent. Cet avis sera pris en compte dans la mesure de leur âge et de leur maturité.
> Aucun enfant ou adolescent ne peut être contraint ou contraint de quelque manière que ce soit à exprimer son opinion. (Code de l'enfant, 2003, art. 60)

En effet, consulter un enfant de sept ans n'est évidemment pas la même chose qu'en consulter un de onze ans. Bien que le développement psychologique ne soit pas seulement mesuré en fonction de l'âge, il est évident que plus les enfants seront âgés, meilleurs seront leur façon de s'exprimer, niveau de conscience et assimilation de la réalité. Cependant, afin de garantir cette faculté, le Juge peut considerer d'autres formes d'expression lors de l'entretien avec des enfants plus jeunes, telles que l'utilisation de techniques comme le jeu et le dessin.

Il convient de rappeler que la Cour Constitutionnelle équatorienne partage les critères constants de l'arrêt du 24 février 2012, rendu par la Cour Interaméricaine des Droits de l'homme (CIDH) à l'affaire Atala Riffo et filles contre le Chili, en accord avec l'Observation générale No 12 du Comité des droits de l'enfant des Nations Unies :

> Il ne suffit pas d'écouter l'enfant, les opinions de l'enfant doivent être prises au sérieux lorsque l'enfant est en mesure de forger son propre jugement, ce qui exige que les opinions de l'enfant soient évaluées par un examen cas par cas . *Si l'enfant est en mesure de se forger son propre jugement de manière raisonnable et indépendante, le juge doit prendre en compte les opinions de l'enfant comme un facteur important dans la résolution du problème* (...). Le cas échéant, l'autorité judiciaire concernée doit spécifiquement expliquer pourquoi elle ne tiendra pas compte de l'option de l'enfant. (Cour constitutionnelle de l'Équateur, 2016) (les italiques soulignés nous appartiennent)

En effet, l'opinion d'un enfant peut être affectée par certaines circonstances, par exemple, dans le contexte de cette pandémie, si l'enfant se rendait normalement au domicile du parent non gardien pour effectuer les devoirs de la langue que son parent dominait et qui était la langue utilisée par son établissement scolaire pour tous les devoirs, l'enfant plus agé comprendra qu'il devra continuer avec la même performance et, quand il sera interrogé, il répondra probablement dans ce sens; tandis qu'en interrogeant le plus jeune enfant, il dira peut-être qu'il préfère ne pas voir son parent, uniquement parce qu'il espère ainsi ne pas accomplir ses travaux scolaires.

Malheureusement, au sujet de ce droit à la consultation, il y a eu partout des cas d'enfants manipulés, dont le parent qui exerceait la garde, a préféré sacrifier le droit corrélatif, pour aboutir, en utilisant ce qu'il considérait à tort comme des stratégies juridiques à sa portée, au dénommé « syndrome d'aliénation parentale », défini comme:

> Trouble caractérisé par un ensemble de symptômes résultant du processus par lequel un parent transforme la conscience de ses enfants de différentes manières afin de prévenir, entraver ou détruire leurs liens avec l'autre parent. (Varsi Rospigliosi, 2018, p. 384)

La première phase de ce syndrome est précisément identifiée par l'isolement effectué par le parent gardien, afin de:

> Générer une dépendance exclusive. Cette construction d'un lien affectif forcé entend devenir sa principale source d'interactions affectives sûres, à une époque où cet élément est de la plus haute importance. Son intérêt secondaire est de l'empêcher d'avoir d'autres visions de la réalité [...]. *Un parent qui tente d'isoler ses enfants de la contamination externe ne peut pas permettre l'arrivée de messages susceptibles de compromettre la crédibilité de ses affirmations.*(Aguilar, 2009, pp. 143-145) (les italiques soulignés nous appartiennent)

2. PROBLÈMES SPÉCIFIQUES DU DROIT DE CONNEXION PENDANT LA PANDÉMIE DE COVID-19.

Les situations évoquées dans les lignes précédentes, observées assez courramment, ont été amplifiées lors de la pandémie de COVID-19; par conséquent le droit de visiter a également été affecté, car il y a aussi certaines peurs qui sont maximisées.

Ainsi, lors des visites régulières, parfois, avec ou sans fondement, le parent gardien craint qu'après les «visites» son enfant revienne négligé, mais cette inquiétude a augmentée pendant cette époque, avec la crainte d'une contagion qui, en plus, est également partagée par l'autre parent lorsqu'il est en contact avec son enfant.

De plus, de nombreux parents coexistent avec leurs propes parents âgés ou qui ont des maladies telles que l'hypothyroïdie et le diabète, lesquelles n'auraient généralement

pas d'incidence lors des visites mais qui, dans la situation pandémique actuelle, font craindre que l'enfant puisse infecter la famille élargie, à cause de sa plus grande vulnérabilité au virus COVID-SARS 2.

En outre, compte tenu des restrictions à la circulation des véhicules en raison de l'état d'urgence, il existe également une limite de circulation en dehors des heures de couvre-feu. Certains états ont réglementé cette situation et les sauf-conduits ont été autorisés, comme au Chili (El Mostrador, 17 avril 2020), mais dans notre pays, rien n'a été prévu sur aucune question liée aux enfants, même dans la « Loi organique sur l'aide humanitaire au combat de la crise sanitaire dérivée du COVID-19 » publié dans le registre officiel le 22 juin 2020.

De plus, il existe certains «régimes des visites» qui sont exércés aux points de rencontre publics, qui sont actuellement fermés. Par exemple: les centres commerciaux, les parcs, les écoles et même les centres psychologiques, derniers endroits où les régimes devaient se dérouler au cours d'une séance de thérapie, mais qui n'ont évidemment pas été réalisables.

Il convient alors de se demander si nous sommes confrontés à une collision de droits: la situation de pandémie et post-pandémie (droit à l'intégrité physique) contre le droit de relation des enfants et des adolescents.

La réponse logique est qu'il ne s'agit pas vraiment d'une confrontation de droits. La quarantaine n'a jamais impliqué un couvre-feu pour les visites, elle ne peut donc pas être manipulée et le droit doit être respecté autant que possible, en garantissant la relation parentale-filiale. Pour que l'enfant exerce effectivement son droit à la famille, il est très important qu'il existe une communication permanente avec les deux parents, en particulier avec le parent non-gardien et sa famille élargie.

> Même si la réglementation en vigueur ne le prévoit pas, ni l'accord auquel les parents sont arrivés pour fixer les visites, il est important de modifier les comportements

erronés, afin que l'intérêt supérieur des enfants soit garanti, conformément aux dispositions de l'article 3 de la Convention relative aux droits de l'enfant, ainsi que des articles 44 de la Constitution équatorienne et 11 du Code de l'enfance et de l'adolescence. A cette fin, le Juge remplira son rôle protecteur en recueillant l'opinion de l'enfant ou de l'adolescent, comme nous l'avons analysé dans les lignes précédentes.

D'autre part, le régime des visites ne produit pas l'autorité de la chose jugée, de sorte que tout parent peut demander sa modification par un incident dans le processus, puisque la résolution judiciaire n'est pas immuable.

Ainsi, le juge, pour prendre sa décision, lorsque les circonstances initiales pour établir le dit régime ont varié, doit obligatoirement analyser le bien-être des enfants et des adolescents. Pour cela, il aura besoin de l'aide de l'organe subsidiaire de la Cour, connu en Equateur sous le nom de Bureau Technique, composé d'une équipe multidisciplinaire de travailleurs sociaux, de psychologues et de médecins.

À cet égard, nous observons un autre problème auquel nous serons confrontés à cause de la pandémie de COVID-19: la necessité inéluctable de mettre à jour les rapports du Bureau Technique pour les procédures déjà établies pour les visites, suspendues depuis le 16 mars 2020.

La paralysie des dossiers en ce sens sera évidente, puisque les dits rapports sont préparés par l'organe subsidiaire de la Cour qui représente les «yeux et oreilles» du juge pour chaque cas particulier. Étant donné que ces rapports d'expertise prendront en moyenne quatre à cinq mois pour se terminer, leur mise à jour sera nécessaire, ce qui signifiera, bien entendu, une cause d'engorgement de ces dossiers dans le système judiciaire.

En effet, d'après les données statistiques officielles établies par le Conseil National Équatorien de la Magistrature, il ressort qu'en 2019, 25.934 affaires ont été déposées en matière familiale, ce qui représente un pourcentage de 47,54

% du nombre total d'affaires saisies, tandis qu'en avril 2020 (la quarantaine est toujours en vigueur), le nombre d'affaires admises était de 6.263, c'est-à-dire 53% de toutes les affaires du système judiciaire équatorien. (Conseil judiciaire, 2020)

Entre-temps, le Conseil Judiciaire équatorien a reconnu que:

> Le délai du traitement des affaires a été aggravé par la pandémie, et surtout, après une réduction de 19,5 millions USD de son budget ... qui a produit un déficit de juges et de personnel juridictionnel, accompagné de la suspension des activités par le coronavirus, *(qui) aboutit à l'accumulation des procédures en cours, avec une affectation directe aux utilisateurs.* (Diario El Comercio, 5 de julion de 2020, p. 6) (les italiques soulignés nous appartiennent)

Par conséquent, le domaine des tribunaux de la famille, de l'enfance et de l'adolescence a été l'un des premiers à reprendre l'attention au public, depuis le 8 juin 2020, mais si l'on considère l'accumulation naturelle des affaires judiciaires en plus des nouvelles procédures, l'on ne peut s'empêcher d'invoquer l'image d'une catastrophe, d'un « tsunami judiciaire » après la pandémie. Malheuresement, au cours des prochains mois, nous aurons cette image chaque fois que nous essayerons de faire aboutir tout procédure judiciaire.

3. SANCTION EN CAS DE NON-RESPECT

De même, il est important, dans le contexte de la réglementation en vigueur, de réfléchir à la sanction qui devrait être établie pour l'entrave à l'exercice du droit en question. En effet, actuellement l'article 125 du Code de l'enfance et de l'adolescence (2003) prévoit:

> Art.125: Rétention illicite du fils ou de la fille.- Le père, la mère ou toute autre personne qui retiendrait illicitement l'enfant dont l'autorité parentale, la garde ou la tutelle a été confiée à une autre personne

> ou qui ferait obstacle aux visites, pourra se voir ordonner par un tribunal de remettre immédiatement l'enfant à la personne qui doit en avoir la garde et sera tenu de verser une indemnité pour le préjudice causé par cette rétention illicite, notamment les dépenses occasionnées par la procédure et la restitution.
> *Si la personne en question refuse d'obtempérer, le juge ordonnera son arrestation, sans préjudice de lui ordonner la perquisition sans mandat des locaux où l'enfant se trouve ou est présumé se trouver, afin de le récupérer...*" *(les italiques soulignés nous appartiennent)*

En realité, cette seule sanction prévue a rarement été appliquée, ce qui nous amène à remettre en question sa véritable utilité. En effet, après plusieurs dispositions judiciaires pour que le parent gardien obéisse au régime des visites établi, lesquelles se prolongent dans le temps par la charge de la procédure judiciaire, le seul résultat sera l'arrestation du parent gardien.

Logiquement, une fois l'entrave démontrée, si l'on relie la finalité du «régime des visites» au comportement de non-respect, la première conséquence devrait être qu'elle soit considérée comme une cause qui serait évaluée par le juge pour priver le parent non gardien de la garde et même de l'autorité parentale, comme moyen de lui imposer une sanction pour son comportement obstructif.

Comme mentionné ci-dessus, certains codes d'Amérique latine autorisent le juge à modifier la garde ou l'autorité parentale en faveur du parent empêché d'exercer son droit de relation.

Ainsi, au Chili, le Code civil à l'article 225-2, lettre d) dispose que:

> Lors de l'établissement du régime et de l'exercice des soins personnels, les critères et circonstances suivants seront pris en considération et pondérés ensemble: d) L'attitude de chaque parent à coopérer avec l'autre, afin de lui assurer une stabilité maximale

> et lui garantir la relation directe et régulière, et pour ce faire, il examinera en particulier les dispositions du cinquième paragraphe de l'article 229... » ce qui a déjà été envisagée par la jurisprudence chilienne. (Barcia Lehmann, 2018, pp. 49-72)

De même, au Pérou, l'article 91 du Code de l'enfance et de l'adolescence (2000) dispose ce qui suit:

> Article 91.- Non-respect du régime des visites.- Le non-respect du régime des visites institué juridiquement donnera lieu à des contraintes légales et en cas de résistance pourra entraîner la modification du mandat. La demande de modification doit être traitée comme une nouvelle action devant le juge qui a entendu la première procédure.

La législation argentine est allée encore plus loin dans la sanction, puisqu'elle caractérise le comportement susmentionné comme un crime et réprime avec des peines de prison d'un mois à un an le parent ou la personne qui, illégalement, empêche ou fait obstacle au contact des mineurs avec leurs parents non cohabitants. (Droit 24.270, 1993)

En Équateur, le «Projet de Loi pour la protection intégrale des filles, garçons et adolescents», à l'article 186, prévoit comme sanction pour l'obstruction répétée au régime des visites, ce qui suit:

> En cas de récidive, le juge pourra suspendre l'autorité parentale de la personne qui n'a pas obéi et, s'il le juge nécessaire, modifier la décision de la garde; de même, il ordonnera l'indemnisation des préjudices causés par la rétention illicite, y compris les frais de procédure occasionnés par la demande et la restitution. (Assemblée nationale de l'Équateur, 2020)

Nous considérons cette proposition comme très appropriée, conformément à ce que nous avons analysé dans le cadre de la réglementation latino-américaine actuelle.

EN CONCLUSION

Les réflexions précédentes montrent clairement l'importance d'accomplir un travail conjoint et coordonné pour un changement de mentalité en Équateur: les parties, les avocats et les juges doivent promouvoir des accords. Il sera certainement plus facile, après la pandémie, de se retrouver dans n'importe quel Centre de Médiation afin d' accorder les visites. Ainsi finalement les enfants et les adolescents bénéficieront du droit de relation et ne devront pas aller devant un juge pour être entendus sur leurs besoins.

Il s'agit de faire un effort commun, de gagner en efficacité, de gagner du temps non seulement en quantité mais en qualité, pour arrêter, au moins un peu, les effets du «tsunami judiciaire». Nous, les avocats, nous devrons joindre nos capacités en vue de réaliser les objectifs communs de nos clients, et les opérateurs judiciaires, dès qu'ils recevront leurs accords, devront assouplir leur attitude pour les promouvoir, assouplissement qui se justifie par le respect de la volonté des parties.

Pour conclure, tout ce qui a été indiqué dans les paragraphes précédents nous permet de constater l'urgence d'une réforme de la loi en matière d'enfance, ainsi que d'accélérer les délais pour son approbation par l'Assemblée Nationale, où les législateurs pourraient accueillir certaines suggestions de ce travail, puisque la pandémie de COVID-19 a définitivement mis en évidence l'effet de la crise au sujet du Droit de l'Enfance, qui concerne directement le développement intégral des enfants et adolescents équatoriens.

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Impacto del Covid-19 en las relaciones laborales en Ecuador

Impact of Covid-19 on labor relations in Ecuador

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RESUMEN: Desde el 11-III-20, en que declaró el estado de emergencia sanitaria en el Ecuador por la inminente posibilidad del efecto provocado por el coronavirus Covid-19, se desató una crisis generalizada en todos los órdenes de la vida social. El sector más afectado, sin duda ha sido el de la salud, con la pérdida de miles de personas. No obstante, el ámbito de las relaciones laborales también ha sido fuertemente impactado. Muchas personas trabajadoras han visto alterados sus derechos, tan caramente conquistados. Se han modificado condiciones del trabajo, y lo peor de todo, se han perdido infinitas fuentes de trabajo, privando así a un considerable porcentaje de la población del derecho fundamental al trabajo, con el cual llevar el alimento a sus hogares. La privación o reducción de los ingresos derivados de una relación laboral, repercute a su vez en otros derechos fundamentales, como la alimentación, la vestimenta, la educación, la salud, el ocio. Por ello, este artículo se dedica a las regulaciones emergentes que se expidieron para enfrentar la crisis provocada por el Covid-19 en el Ecuador y de cómo ellas, en muchos casos, inobservaron principios fundamentales del Derecho del Trabajo; aunque ello pudiera considerarse razonable y legítimo dada la situación de extrema excepcionalidad. El análisis se circunscribe a las relaciones laborales de los empleados privados y los obreros, es decir, a los

trabajadores sujetos al Código del Trabajo. También se refiere, finalmente, a los retos que se presentan para la reactivación económica en los nuevos escenarios y condiciones laborales en lo que se ha denominado "la nueva normalidad", así como al gran desafío que tiene el Derecho del Trabajo para redefinirse, sin perder su razón de ser, y así adaptarse a las exigencias del trabajo del futuro y del futuro del trabajo, como resultado de la globalización, de los avances de la ciencia y de la tecnología, y la consecuente automatización. En definitiva, se refiere a la necesidad de que el nuevo Derecho del Trabajo se proyecte al futuro del mundo del trabajo con una mirada diferente, innovadora y progresista para ser más justo, equitativo e inclusivo.

PALABRAS CLAVES: jornadas de trabajo; principios del Derecho Laboral; regulaciones emergentes.

SUMMARY: Since March 11, 1920, when a state of health emergency was declared in Ecuador due to the imminent possibility of the effect of the coronavirus Covid-19, a generalized crisis has been unleashed in all areas of social life. The most affected sector has undoubtedly been the health sector, with the loss of thousands of people. However, the area of labour relations has also been strongly impacted. Many workers have seen their rights altered, so dearly won. Working conditions have changed, and worst of all, infinite sources of work have been lost, thus depriving a considerable percentage of the population of the fundamental right to work, with which to take food home. The deprivation or reduction of income derived from an employment relationship, in turn, affects other fundamental rights, such as food, clothing, education, health and leisure. Furthermore, this research article is dedicated to the emerging regulations that were issued to confront the crisis provoked by Covid-19 in Ecuador and how they, in many cases, failed to observe fundamental principles of labour law. However, this could be considered reasonable and legitimate, given the situation of extreme exceptionality. The analysis is limited to the labour relations of private employees and workers, i.e., workers subject to the Labour Code. It refers, finally, to the challenges presented by the economic revival in the new

scenarios and working conditions in what has been called "the new normality", also by the great challenge that Labour Law has to redefine itself, without losing its raison d'être. Thus, for adapting to the demands of future work and the future of labour (as a result of globalisation, advances in science and technology, and the consequent automatization). In short, it refers to the need for the new Labour Law to project itself into the future of the world of work with a different, innovative and progressive outlook in order to be more just, equitable and inclusive.

KEY WORDS: working days; principles of Labour Law; emerging regulations.

1. UNA NECESARIA CONTEXTUALIZACIÓN. DECLARATORIA DE EMERGENCIA SANITARIA POR COVID-19

Mediante Acuerdo 126-2020, de 11-III-20, el Ministerio de Salud Pública del Ecuador declaró el estado de emergencia sanitaria por la inminente posibilidad del efecto provocado por el coronavirus COVID-19 (en adelante simplemente COVID-19) y prevenir así un posible contagio masivo en la población. El 16 de marzo el presidente de la República, mediante Decreto Ejecutivo 1017 declaró el estado de excepción por calamidad pública en todo el territorio nacional, por los casos de coronavirus confirmados y la declaratoria de pandemia de COVID-19 por parte de la Organización Mundial de la Salud.

En el mismo Decreto, se declaró toque de queda, es decir, la restricción general de circulación de personas y vehículos en vías y espacios públicos. Se exceptuó del toque de queda a ciertas personas, tales como las que prestan servicios básicos, miembros de la Policía y Fuerzas Armadas, comunicadores sociales acreditados, personas que por razones de salud deban trasladarse a un centro médico y a personas que requieran circular para abastecerse de productos de primera necesidad, entre otras. Adicionalmente, se suspendió la jornada presencial de trabajo para todos los trabajadores y empleados del sector público y privado. Se exceptuaron de esta regla general a quienes prestan servicios públicos básicos, de salud, seguridad, bomberos, riesgos, aeropuertos, terminales aéreos,

terrestres, marítimos, fluviales, bancarios, provisión de víveres, sectores estratégicos y otros servicios que ayudan a combatir la propagación del COVID-19; estableciéndose que dichas personas podían mantener la jornada laboral presencial. La suspensión de la jornada presencial de trabajo en un primer momento fue solo para los días comprendidos entre el 17 y 24 de marzo de 2020. Sin embargo, esto se fue prolongando y luego flexibilizando, en función de las disposiciones del Comité de Operaciones de Emergencia (COE). Se dispuso también que las industrias, cadenas y actividades comerciales en las áreas de alimentación, salud, cadena de exportaciones, industria agrícola, ganadera y de cuidado de animales siguieran funcionando. Expresamente se ordenó que los supermercados, tiendas, bodegas y centros de expendio de víveres y medicinas no cierren sus puertas, y que las plataformas digitales de entregas a domicilios continúen con sus servicios, para así garantizar los servicios básicos de alimentación y salud.

Es así como desde entonces se desató una grave crisis en los diferentes órdenes de la vida social. El ámbito de la salud ha sido el más afectado, y se lamentan hasta el momento alrededor de 600.000 muertes a nivel mundial, cifras que lamentable e inevitablemente seguirán aumentando. Si bien nada puede compararse con la pérdida del más preciado de los derechos humanos, la vida, no se puede desconocer que la pandemia también ha impactado grandemente a la economía de los 218 países en los que se ha dado el brote del virus mortal. Y, como siempre, quienes se encuentran en situación de mayor vulnerabilidad son los que reciben la peor parte.

El ámbito de las relaciones laborales también ha sido fuertemente afectado. Muchas personas trabajadoras han visto alterados sus derechos, tan caramente conquistados. Se han modificado condiciones del trabajo, y lo peor de todo, se han perdido infinitas fuentes de trabajo, privando así a un considerable porcentaje de la población del derecho fundamental al trabajo, con el cual llevar el alimento a sus hogares. La falta de un trabajo o la reducción de las horas laborables, con la consecuente privación o reducción de los ingresos, respectivamente, repercute a su vez en otros derechos fundamentales como la alimentación, la vestimenta, la educación, la salud, el ocio.

Por todo lo dicho, dedicaremos este artículo a analizar las regulaciones emergentes que se expidieron para enfrentar la crisis provocada por el COVID-19 en el Ecuador, y de cómo ellas, en muchos casos, inobservaron principios fundamentales del Derecho del Trabajo. También nos referiremos a los retos que se presentan para la reactivación económica en los nuevos escenarios y condiciones laborales en lo que se ha denominado "la nueva normalidad". Dicho análisis se limitará a las relaciones laborales en los empleados privados y los obreros, es decir, los trabajadores sujetos al Código del Trabajo. También nos al gran desafío que tiene el Derecho del Trabajo para redefinirse, sin perder su razón de ser, y así adaptarse a las exigencias del trabajo del futuro y del futuro del trabajo, como resultado de la globalización, de los avances de la ciencia y de la tecnología, y la consecuente automatización. En definitiva, nos referiremos a la necesidad de que el nuevo Derecho del Trabajo se proyecte al futuro del mundo del trabajo con una mirada diferente, innovadora y progresista para ser más justo, equitativo e inclusivo.

2. REPERCUSIONES DE LA DECLARATORIA DE EMERGENCIA SANITARIA EN LOS SECTORES PRODUCTIVOS Y LABORALES

En el Ecuador, el tejido empresarial está compuesto por aproximadamente un millón de unidades productivas que generan más de tres millones de plazas de empleo. Dentro de este tejido, las micro, pequeñas y medianas empresas representan el 99%, generando el 68% del empleo. En virtud de la emergencia sanitaria, las unidades productivas tuvieron que paralizar sus actividades, constituyéndose en unos de los segmentos más afectados debido a la falta de ingresos, falta de liquidez, reducción de la demanda (nacional e internacional), dificultad para acceder a insumos, reducción o falta de mano de obra, difícil acceso a financiamiento y procesos productivos que no están ajustados para ser operados de manera remota o automatizada, lo que podría aumentar el cierre de muchas unidades productivas y a su vez, la desvinculación de muchos trabajadores y la disminución de la calidad de vida de muchas familias ecuatorianas, si no se buscan herramientas

para el fortalecimiento del tejido productivo y el fomento de la empleabilidad y el dinamismo productivo del país (Considerando del Decreto Ejecutivo 1074, 2020). Los sectores productivos y laborales más afectados han sido los del comercio al por mayor y al por menos (centros y locales comerciales) excepto los dedicados a la producción y expendio de alimentos y servicios de primera necesidad; el de la hotelería y turismo; los espectáculos públicos (entretenimientos y recreación); el inmobiliario; la industria manufacturera, entre otros.

Lo expresado se corrobora por el Observatorio de la Organización Internacional del Trabajo en la quinta edición referida al Covid-19 y el mundo del trabajo de 30 de junio 2020. Sostiene que el trabajo se ha visto muy afectado por la aplicación de medidas de confinamiento, en particular varias formas de cierre de lugares de trabajo, excepto los esenciales, siendo, en este sentido, la región las Américas la más afectada por restricciones a trabajadores y lugares de trabajo. Así, "la pandemia ha puesto de manifiesto amplias deficiencias y desigualdades en el mundo del trabajo, y las ha acentuado" (OIT, 2020), como en el caso de las mujeres, los jóvenes y los trabajadores del sector informal, lo que "pone de relieve tendencias inquietantes, susceptibles de exacerbar la disparidad y condicionar los modestos avances logrados en los últimos años en materia de igualdad de género en el mercado laboral" (OIT, 2020). Por lo que concluye que la pérdida de horas de trabajo en la primera mitad de 2020 ha sido mayor que la prevista, lo que pone de manifiesto el empeoramiento de la situación en las últimas semanas, en particular en los países en desarrollo" (OIT, 2020).

Por su parte, el Ministerio de Trabajo ha proporcionado las siguientes cifras respecto a las novedades referidas a las relaciones laborales, durante el estado de excepción. Así, se informa que a tres meses desde que se suspendió la jornada de trabajo presencial, 425.328 personas se encuentran laborando mediante la modalidad de teletrabajo (138.927 en el sector privado y 286.401 en el sector público). Que durante la pandemia se dio por terminado un total de 180.852 contratos (15.724 por despido intempestivo; otros 16.874 alegando fuerza mayor y 100.797 por acuerdo entre las partes; 47.457 terminaron por

otras causales como desahucio, conclusión de obra, etc.). De lo dicho, se concluye que el 20% de las desvinculaciones se produjeron de modo imprevisto, orillando al desempleo a más de 30.000 personas en el país (Oficio Nro. MDT-MDT-2020-0335, citado en Decreto Ejecutivo 1074, 2020).

De esta manera las actividades repentinamente suspendidas, al menos las que no podían desarrollarse mediante la modalidad del teletrabajo, llevaron a empleadores, a pequeñas y medianas empresas a una situación económica extrema, en razón de que debían continuar pagando las remuneraciones y los demás beneficios de ley, así como los aportes al Instituto Ecuatoriano de Seguridad Social, pese a mantener las actividades paralizadas y consecuentemente no tener ingresos. Situación que en pocos meses se concretó en la terminación de las relaciones laborales, en algunos casos, motivada en el cierre y liquidación de algunas pequeñas y medianas empresas, como consecuencia de la imposibilidad de los trabajadores de cumplir con el objeto del contrato individual de trabajo y el descalabro económico de la parte empleadora.

3. REGULACIONES DURANTE LA EMERGENCIA SANITARIA

Frente al panorama devastador ya descrito, era necesario e imperativo arbitrar medidas para orientar el accionar en las actividades productivas y laborales en general a fin de garantizar, en primer lugar, la salud y seguridad de todas las personas trabajadoras y de la sociedad en general, y, en segundo lugar, procurar el menor impacto posible en las relaciones laborales, y por ende en la economía de los hogares. Así, casi de forma inmediata, se activaron las propuestas de reformas en el sistema normativo. Pero, como es de suponer, lo primero fueron Acuerdos Ministeriales, que siempre son más ágiles en su expedición. En todo caso, fue una respuesta absolutamente reactiva frente a una crisis generalizada que obligaba una intervención estatal. Carlos Palomeque (2011) ya nos advertía, que la crisis económica ha acompañado siempre al Derecho del Trabajo como “un compañero de viaje histórico”, puesto que “la lógica clásica del Derecho del Trabajo presupone verdaderamente la expansión o, al menos, la estabilidad del sistema económico” (p. 36). De allí que se entienda que

las autoridades de trabajo no podían pasar por alto la crisis económica y sanitaria generalizada, como se evidencia de todas las regulaciones emergentes que se expidieron para hacerle frente, según veremos a continuación.

3.1. Acuerdos ministeriales

Fue el Ministerio del Trabajo, responsable de velar por los derechos de los trabajadores y empleadores, el que se pronunció expidiendo de manera emergente acuerdos ministeriales sobre medidas ya contempladas, por cierto, en el Código del Trabajo. Es decir, no se trató de nuevas regulaciones, sino de orientaciones para aplicar normativa ya existente. Concretamente nos referimos al teletrabajo emergente, así como, posteriormente, a las directrices para la aplicación de la modificación, reducción y suspensión de la jornada de trabajo, que pasaremos a revisar de inmediato.

3.1.1. Teletrabajo emergente

La modalidad del teletrabajo, entendida como una forma de prestación de servicios de carácter no presencial, haciendo uso de las tecnologías de la información y comunicación, ya se aplicaba tímidamente en el Ecuador. Se encontraba regulada por el AM MDT 190-2018. Decimos tímidamente, ya que hasta la crisis generada por la pandemia del Covid-19, eran muy pocos los empleadores que utilizaban esta modalidad, posiblemente por desconfianza, ya que existe, o al menos existía hasta antes de marzo de 2020, la idea en el imaginario colectivo, que si no existe una supervisión directa y permanente del trabajo no hay eficacia en los resultados ni un trabajo verdaderamente efectivo. Cabe citar al respecto el Art. 61 del Código de Trabajo (2005) que se refiere al cómputo del trabajo efectivo, entendido como aquel en que el trabajador se halla a disposición de sus superiores o del empleador, cumpliendo órdenes suyas. Esto, doctrinariamente se ha considerado, que no equivale a que el trabajador realice sin cesar una determina actividad, sino que incluye el tiempo en que aun no haciendo nada, se encuentra de todos modos a disposición del empleador; es decir, cumpliendo órdenes o dispuesto a cumplirlas. En todo caso, estimamos que no había la confianza y madurez necesaria como para permitir

que las personas trabajadoras realicen sus actividades, lejos del "ojo" de la persona beneficiaria de los servicios o de sus supervisores.

En virtud del Decreto Ejecutivo 1074 (2020), ya referido, que ordenó la suspensión de las jornadas laborales presenciales, resultó obligado el acogerse, en la medida de lo posible, a esta modalidad del teletrabajo. Ante ello, el Ministerio del Trabajo expidió el 12-III-20 el AM MDT 076-2020. Este Acuerdo reguló el teletrabajo de manera emergente en los términos que revisaremos enseguida. Lastimosamente, dada la emergencia, no fue posible verificar el cumplimiento previo de los requisitos para una adecuada implementación de esta modalidad, particularmente en cuanto a la provisión de los materiales de trabajo y verificación de las condiciones de salud y seguridad ocupacional. Otra gran desventaja, sin duda, ha sido que una gran cantidad de actividades no pueden realizarse a través de los medios telemáticos; o simplemente, no existían las condiciones mínimas, como es la necesaria conectividad y el desarrollo previo de competencias digitales. Sea como fuere, tanto trabajadores como empleadores debieron, pese a las resistencias, resignarse y aventurarse a incursionar en esta modalidad de trabajo, de manera, muchas veces, improvisada.

El Ministerio de Trabajo dejó claramente establecido que el acogerse o no a esta modalidad, era absolutamente potestativo del empleador. Esto en razón de la parte empleadora es la que tiene siempre la facultad de dirigir, organizar y supervisar el trabajo, y, por ende, es a la que le corresponde decidir, analizadas las circunstancias y tipo de actividad, si era o no procedente acogerse a esta modalidad laboral. En caso de hacerlo, debía simplemente informar al Ministerio sobre el inicio y el fin de la modalidad, con la indicación de los trabajadores que se sometían a la misma. Es importante destacar que, mediante este cambio emergente, solo se facultaba modificar el lugar del trabajo, no así el resto de las condiciones de trabajo.

Esta modalidad, implementada como consecuencia del Covid-19, es decir, el teletrabajo "emergente" puede terminar, ya sea por acuerdo de las partes, en cualquier momento, o por la terminación de la declaratoria de emergencia sanitaria, que le dio origen. Más adelante revisaremos la reforma introducida, mediante la Ley de Apoyo Humanitario, por la que se incorpora al Código del Trabajo el teletrabajo como una modalidad más, ya no "emergente", en cuyo caso no procede, ha de entenderse, la terminación de la declaratoria de emergencia sanitaria como causal de finalización de dicha modalidad contractual.

3.1.2. Modificación, reducción y suspensión de las jornadas de trabajo

El Ministerio de Trabajo, días después, expidió el AM 077-2020-, de 15-III-20, solo para sector privado, para impartir directrices para la aplicación de la modificación, reducción y la suspensión de las jornadas de trabajo. La intención fue presentar a los empleadores las alternativas, ya previstas en el Código del Trabajo, que podían aplicar a fin de afrontar la emergencia provocada por el Covid-19. Estas medidas pueden subsistir hasta tanto acuerden las partes, de común acuerdo, ponerle término, o bien por la finalización de la declaratoria de emergencia.

Al respecto cabe recordar que existen axiomas jurídicos que podemos invocar para justificar ciertas normativas, disposiciones o acciones. Tal es el caso de los axiomas, por una parte, de que en Derecho "las cosas de deshacen como se hacen"; y por otra, aquel que nos dice que "quien puede lo más, puede lo menos". Es por ello que podríamos sostener que, si las partes estuvieron facultadas para acordar las condiciones de trabajo antes de iniciar la relación laboral, ellas mismas puedan modificarlas, en cualquier momento, siempre que en todo caso no implique regresión, ni renuncia de derechos. Los mismo podríamos decir respecto al segundo: si las partes pudieron acordar libremente las condiciones de la relación laboral (lo más), pueden modificar, de común acuerdo algunas de esa condición (lo menos).

También en la doctrina se reconoce el *ius variandi*, entendido como la facultad que tiene el empleador de modificar la forma y modalidades del trabajo. Pero, para la validez de estas modificaciones es preciso la concurrencia de los siguientes requisitos que nos menciona Rosa Elena Bosio (2019), los mismos que están recogidos en la Ley del Contrato de Trabajo, y son: "la razonabilidad, la alteración no esencial del contrato y la ausencia de perjuicio material y moral para el trabajador" (p.169). Indudablemente que todos los requisitos mencionados pueden resultar subjetivos y muy cuestionables al momento de su aplicación. Bien se podría sostener que todas las medidas emergentes no han sido suficientemente razonables, permiten la alteración de manera esencial el contrato y perjudican material y moralmente al trabajador. No obstante, situaciones completamente excepcionales, ajenas a la voluntad de las partes, como son la declaratoria de la emergencia sanitaria y posterior declaratoria del estado de excepción y el consecuente toque de queda, como las que se viven a causa de la pandemia, no solo en el Ecuador sino a nivel mundial, legitiman en buena parte tales medidas, que son igualmente excepcionales y temporales.

Es por ello que la modificación de la jornada puede acordarse entre las partes vinculadas por un contrato de trabajo cuando se impone para continuar con el desarrollo de las actividades productivas y laborales. Es así como dentro de las directrices previstas en el AM-MDT 077-2020 (2020) se estableció que la jornada podía modificarse, incluyendo los días sábados y domingos, sin que por ello se considerara jornada extraordinaria, siempre que no excediera de las 40 horas semanales. Exigía además que se garantice el descanso de 2 días semanales, según la reforma introducida mediante AM-MDT 80-2020 (2020). También la modificación de la jornada puede darse al momento de aplicar la jornada de recuperación, prevista en el Art. 60 del Código del Trabajo, a la que nos referiremos más adelante, a propósito de la suspensión emergente de la jornada de trabajo. El AM-MDT 077-2020 (2020) simplemente ratifica lo ya establecido en el Código del Trabajo, al establecer que corresponde al empleador determinar la forma y el horario de trabajo, al retorno, respetando límites de jornada máxima. La novedad, en todo caso, está en la fijación de un límite semanal

para la jornada de recuperación, situación que no contempla el Código de Trabajo, sino para la jornada suplementaria. Así, fija como máximo 12 semanales y 8 en sábados, según reforma introducida por el AM MDT 80-2020 (2020).

En cuanto a la reducción de la jornada laboral, cabe insistir en que esta igualmente ya se encuentra prevista en el Código del Trabajo (2005), como primer artículo enumerado a continuación del Art. 47 (es decir, como 47.1). La reducción excepcional de la jornada de trabajo es resultado de la reforma introducida por la Ley de Promoción del Trabajo Juvenil y regulación excepcional de la jornada de trabajo (RO-S 720, 28-III-2016, 2016, última modificación 1-IV-16). No obstante, dicha regulación limita esta reducción excepcional a seis meses, renovables por una sola vez. Además, exige que medie el previo acuerdo de las partes. Por su parte, el AM-MDT 077-2020 (2020) solo menciona la reducción de la jornada como una alternativa para mitigar la crisis, y en todo caso, para no llegar a la suspensión de las jornadas, y peor aún a la terminación de las relaciones laborales. Sin embargo, como veremos más adelante, la Ley de Apoyo Humanitario reguló de una manera diferente esta reducción de la jornada, con los efectos que comentaremos oportunamente.

Como tercera opción prevista en el AM-MDT 077-2020 (2020), se encuentra la suspensión de la jornada de trabajo, para cuando sea imposible, como medidas emergentes, el teletrabajo, la modificación, o la reducción de la jornada laboral. Dicha suspensión debía acogerse a lo previsto en el Art. 60 del Código del Trabajo, para lo cual el empleador determinará forma y horario (según se agregó de manera expresa el AM-MDT 093-2020. 2020). Con todo, en el mismo Acuerdo se aclara que en caso de que el empleador decida acogerse a la suspensión de la jornada de trabajo, solo debía notificar al trabajador, sin que ello se considerara despido intempestivo. El referido artículo 60 se refiere al supuesto de que por causas ajenas a la voluntad de las partes se produjere una suspensión colectiva de las actividades, en cuyo caso el empleador tiene derecho a recuperar las horas no trabajadas, una vez que se retorne a los lugares de trabajo. (CT, 2005) Para ello podrá fijar nuevos horarios de trabajo, extendiendo las jornadas hasta por tres horas diarias, hasta

completar el tiempo perdido y la remuneración pagada. Esto en razón de que durante la suspensión persiste la obligación del empleador de pagar la remuneración a los trabajadores que se ven impedidos de prestar sus servicios de manera regular.

3.1.3. Calendarización para pagos

El principal derecho de las personas trabajadoras es percibir, como contraprestación del servicio prestado, las remuneraciones y demás beneficios económicos de manera íntegra y oportuna. Consecuentemente, el pago de las obligaciones pecuniarias es la principal obligación de la parte empleadora. Tal es así, que la disminución, la falta de pago o el retraso en el cumplimiento de dicha obligación, constituye una causa para que los trabajadores soliciten el visto bueno. En caso de que, por este motivo, y mediando la respectiva resolución del Inspector del Trabajo, se diera por terminadas las relaciones laborales, el empleador deberá las correspondientes indemnizaciones por tratarse de un despido indirecto. Otra consecuencia de la inobservancia de los principios mencionados es la condena al empleador al pago del triple del monto adeudado, si para el cobro de las remuneraciones impagas, el trabajador tuviera que acudir a la vía judicial; o tratándose del fondo de reserva, la condena al pago del recargo del 50%; a más de multas que obviamente por tales motivos pudieran imponer las autoridades del trabajo, multas que oscilan desde los tres hasta los veinte salarios básicos.

Pese a todo lo dicho, resulta indudable que la crisis provocada por el Covid-19, puso a los empleadores en situaciones extremadamente difíciles y excepcionales, impidiéndoles cumplir con sus obligaciones laborales. De allí que para evitar ya sea la terminación de los contratos de trabajo, y peor aún, el cierre o liquidación de las empresas, el AM MDT 80-2020, de 28 de marzo de 2020, permitió que las partes de una relación laboral acordaran un calendario para honrar las obligaciones pendientes de pago. Esta calendarización, sin duda, contradice los principios de oportunidad y oportunidad. No obstante, estimamos que, dadas las circunstancias absolutamente excepcionales, y siempre que se garantizara a los trabajadores un ingreso mínimo, digno y suficiente, según sus ingresos

acostumbrados, podía darse paso a esta alternativa que dio el Ministerio de Trabajo de acordar un calendario de pagos, hasta tanto se regularizara medianamente la situación producto de la emergencia.

3.1.4. Regulación emergente de vacaciones

Otro de los derechos reconocidos a los trabajadores sujetos al Código del Trabajo (2005) es el de disfrutar de un período de 15 días de vacaciones por cada año de servicios. Este derecho se incrementa en un día por cada año que excede a los 5 primeros laborados en favor del mismo empleador, hasta un máximo de 15 días adicionales. Este derecho, como todos los demás de los trabajadores, es irrenunciable. Este período de vacaciones, de no pactarse en el contrato, o de no mediar acuerdo de las partes, es facultad del empleador el fijarlo, siempre que lo comunique el trabajador con al menos 3 meses de anticipación.

Lo dicho son las reglas generales, de conformidad a las normas vigentes previstas en el Código del Trabajo. Sin embargo, frente a la emergencia sanitaria, y dada las dificultades económicas de los empleadores, sumado al hecho de que algunas actividades, tales como las referidas a espectáculos públicos, cines, discotecas, restaurantes, entre otras, estaban expresamente prohibidas, el AM-MDT 80-2020 (2020) prescribió la posibilidad realizar una planificación emergente de las vacaciones. Dicha planificación era facultativa de la parte empleadora, y no requería observar la anticipación legal. Es decir, se podía simplemente notificar al trabajador que debía acogerse al goce de sus vacaciones acumuladas, prácticamente, de manera inmediata. Y, en caso de que mediara acuerdo de las partes, se podían otorgar, inclusive, vacaciones anticipadas. Con esta medida, no muy comprendida ni aceptada, se pretendió, al menos de manera emergente, atenuar el impacto de la suspensión de las actividades. Muchos no veían la diferencia con la suspensión de la jornada ya que tanto esta como las vacaciones implican que el empleador debe remunerar al trabajador por el tiempo no laborado. En el primer caso, condicionado a que recupere las horas no trabajadas. En el

segundo, sin recuperación, pero en cambio resultaba un alivio por cuanto las vacaciones acumuladas requieren contar con la debida provisión presupuestaria.

3.2. Ley de Apoyo Humanitario

Frente a los efectos negativos en la economía mundial producidos por la pandemia del Coronavirus, era necesario dar un "alivio a la ciudadanía, al sector productivo y a la economía popular y solidaria para hacer frente a la actual situación económica y sanitaria del país" (Ley de Apoyo Humanitario para combatir la crisis sanitaria derivada del Covid-19, 2020). De conformidad a su Art. 1 de la Ley Humanitaria (2020), tiene por objeto establecer medidas de apoyo humanitario, necesarias para enfrentar las consecuencias derivadas de la crisis sanitaria ocasionada por el COVID-19, a través de medidas tendientes a mitigar sus efectos adversos dentro del territorio ecuatoriano; que permitan fomentar la reactivación económica y productiva del Ecuador, con especial énfasis en el ser humano, la contención y reactivación de las economías familiares, empresariales, la popular y solidaria, y en el mantenimiento de las condiciones de empleo. Así, el Capítulo III está dedicado a las medidas para apoyar la sostenibilidad del empleo. En él se regulan: los acuerdos de preservación de fuentes de trabajo (Arts. 16-18); el contrato especial emergente (Art. 19); la reducción emergente de la jornada de trabajo (Art.20); el goce de las vacaciones (Art. 21); temas que analizaremos de inmediato. El mencionado Capítulo se refiere además a: las prestaciones del seguro de desempleo (Art. 22-23); la priorización de contratación a trabajadores, profesionales, bienes y servicios de origen local (Art. 24); y, la estabilidad de trabajadores de la salud (Art.25), los mismos que no analizaremos en esta oportunidad por cuanto escapan del ámbito delimitado en la primera parte de este artículo.

3.2.1. Acuerdos para la preservación del empleo

Con la finalidad de preservar las fuentes de trabajo y garantizar estabilidad a los trabajadores, se podrán modificar, previo acuerdo de las partes, las condiciones económicas del contrato de trabajo (Ley de Apoyo Humanitario para combatir la crisis sanitaria derivada del Covid-19, 2020, arts. 16-18). Tales

acuerdos pueden ser a propuesta de cualquiera de las partes. Serán bilaterales y directos, es decir entre el empleador en cuestión y sus trabajadores, individualmente considerados. No obstante, si las nuevas condiciones económicas fueran resueltas por la mayoría de los trabajadores, quienes no estuvieren de acuerdo, de todos modos, quedarán obligados a acatarlas.

Los acuerdos a los que se arriben bajo ninguna circunstancia podrán afectar el salario básico o los salarios sectoriales determinados para jornada completa o su proporcionalidad en caso de jornadas reducidas. Esto debe entenderse, que no se admitirá, a pretexto de la emergencia sanitaria, o la necesidad de preservar la fuente de trabajo, que se acuerden salarios por debajo de los mínimos establecidos por el Ministerio de Trabajo. Sin embargo, puede resultar por efecto del acuerdo que a una persona trabajadora que recibía el salario mínimo, se le reduzca la jornada y consecuentemente su ínfima remuneración también, de manera proporcional. Ante ello cabe cuestionarse si resulta legítimo que se reduzcan los mínimos, considerados tales para la supervivencia, o si acaso se debió establecer una tabla para que las reducciones afecten a quienes más ganan y no a quienes tienen los niveles más bajo de ingresos.

En razón de que resulta casi impensable que los trabajadores acepten acordar con sus empleadores la reducción de sus ingresos, se ha previsto una norma que establece que, si fuere imprescindible para subsistencia de la empresa tales acuerdos y no se los lograre, entonces se deberá dar paso al proceso de liquidación. Es decir, es una clara forma de presionar a los trabajadores a aceptar esta violación a sus derechos con el único propósito de salvaguardar la fuente de empleo. Es de esperar, que los acuerdos sean de los más mesurados, razonables, de corta duración, y que se den cuando se justifique que verdaderamente es la única medida para evitar la liquidación de la empresa o negocio.

Para que procedan tales acuerdos el empleador debe presentar los estados financieros de forma clara y completa que justifiquen la necesidad de suscribirlos. En todo caso, deberá entenderse que estos acuerdos pueden pactarse

mientras dure la emergencia y por tan solo el tiempo fijado por las partes; más aún estimamos que faltó delimitar, al igual que si se lo hizo para el caso de la reducción de la jornada y el contrato especial emergente, a un año con la posibilidad de una sola renovación por un período igual. En todo caso, una vez suscritos tales acuerdos, estos tendrán preferencia sobre cualquier otro acuerdo o contrato. Ello sin perjuicio de que puedan ser impugnados por terceros en caso de fraude. Y, si el juez presume la existencia de un delito vinculado a la celebración del acuerdo, lo dará a conocer a la Fiscalía General del Estado para las investigaciones y acciones correspondientes. Así también, el uso doloso de recursos de la empresa en favor de sus accionistas o administradores, durante la vigencia del acuerdo, será considerado causal de quiebra fraudulenta y dará lugar a la anulación del acuerdo y a la sanción establecida por el Código Orgánico Integral Penal. Finalmente, para evitar que los empleadores se beneficien maliciosamente de los acuerdos (reduciendo los ingresos de sus trabajadores y elevando consecuentemente sus ganancias, o al menos reduciendo sus costos), se establece la prohibición de distribuir dividendos correspondientes a los ejercicios en que los acuerdos para la preservación de los empleos estén vigentes, ni reducir capital social durante tiempo de vigencia de los mismos. En todo caso, corresponderá al Ministerio del Trabajo supervisar el cumplimiento de los referidos acuerdos. Y, de producirse el despido del trabajador al que se aplica el acuerdo, dentro del primer año de vigencia de la Ley de Apoyo Humanitario, las indemnizaciones correspondientes se calcularán con la última remuneración percibida por el trabajador antes del acuerdo, de conformidad al Art. 95 del Código del Trabajo, es decir, considerando todo lo que el trabajador reciba en dinero, servicios o especies, inclusive lo que percibiere por trabajos suplementarios o extraordinarios, a destajo, comisiones, participación en beneficios o cualquier otra retribución que tuviera el carácter de normal en la industria o servicio.

3.2.2. Contrato especial emergente

La figura del contrato especial emergente fue introducida por la Ley de Apoyo Humanitario para contribuir a la sostenibilidad del empleo. Se considera tal al contrato individual de trabajo por tiempo definido que se celebra para la sostenibilidad de la producción y fuentes de ingresos en situaciones emergentes o para nuevas inversiones o líneas de negocio, productos o servicios, ampliaciones o extensiones del negocio, modificación del giro del negocio, incremento en la oferta de bienes y servicios por parte de personas naturales o jurídicas, nuevas o existentes o en el caso de necesidades de mayor demanda de producción o servicios en las actividades del empleador. Es decir que se trata de un contrato emergente por tiempo definido de un año renovable por una sola vez.

En este contrato especial es posible pactar una jornada laboral completa o parcial, repartida hasta en seis días semanales. Consecuentemente, la remuneración y demás beneficios legales deberán ser pagados de manera proporcional, de acuerdo con la jornada pactada. En caso de terminación antes del plazo o de manera unilateral por cualquier de las partes, da derecho a la bonificación por desahucio y demás beneficios de ley calculados de conformidad al Código del Trabajo. Superado el plazo, de continuar, se convierte en indefinido. El Ministerio de Trabajo, mediante AM 132-2020, de 15 de julio expidió las directrices para el registro de las modalidades y acuerdos laborales establecidos en la Ley de Apoyo Humanitario. Se aclara, mediante la Disposición Transitoria Tercera que los acuerdos suscritos con anterioridad, de conformidad con las directrices del mismo Ministerio, tendrán plena vigencia por el tiempo que se lo hubiere pactado y se podrán renovar por el mismo plazo por una sola ocasión adicional. Con todo, se advierte que en cualquier momento se podrán suscribir nuevos acuerdos según la Ley de Apoyo Humanitario.

Por lo tanto, las novedades que trae este contrato, a más de retornar a la figura del contrato a plazo, ya derogado desde el 20-IV-15, es que la jornada parcial permanente tiene un mínimo 20 horas y que el máximo de 40 horas semanales puede ser repartido en máximo seis días semanales. Además,

que el descanso semanal será al menos de veinticuatro horas consecutivas. Tampoco habría lugar a las indemnizaciones por terminación del contrato antes del plazo, sino solo a la liquidación correspondiente y a la bonificación del 25% por cada año de servicios. Ha de entenderse que, superado el plazo máximo de duración de este contrato, es decir, de dos años, y se diere por terminado, entonces sí habrá lugar a las indemnizaciones que correspondan al contrato indefinido que es al momento la modalidad típica de los contratos de trabajo. Dicha indemnización sería equivalente a tres meses de remuneración, si el contrato no supera los tres años de duración, o bien, a un mes por cada año de servicios a partir del cuarto año (considerando la fracción del año como año completo). Toda indemnización, en todo caso, se calculará en función del Art. 95 primer inciso del Código del Trabajo (2005), como ya ha quedado descrito anteriormente

3.2.3. Reducción emergente de la jornada de trabajo

Ya habíamos señalado que en el Código del Trabajo se incorporó, en el Art. 47.1, la regulación excepcional de la jornada de trabajo. No obstante, resulta imperioso advertir que la Ley de Apoyo Humanitario no deroga dicho artículo, ni la referida figura. Es decir que al momento coexiste la reducción excepcional de la jornada de trabajo, con la reducción emergente de la jornada de trabajo. La primera, insistimos, regulada por el Código del Trabajo, que permite la reducción de la jornada hasta en un 25%, con la consecuente reducción de la remuneración. Para que proceda se requiere contar con la autorización del Inspector del Trabajo, el acuerdo de las partes, y la justificación de las circunstancias que obligan tal medida. En todo caso, dicha reducción solo puede ser hasta por seis meses renovable por tan solo una vez.

En cambio, por medio de la Ley de Apoyo Humanitario (2020), se introdujo mediante el Art. 20 la figura de la reducción emergente de la jornada de trabajo. Se entiende esta nueva figura como la rebaja de las horas de trabajo, en este caso hasta un 50%, con la consecuente reducción, igualmente proporcional de la remuneración (aunque se prohíbe que se reduzca más del 45%, es decir la remuneración no podrá ser inferior al 55%).

Igualmente, los aportes al Instituto Ecuatoriano de Seguridad Social se realizarán en función de la jornada reducida. En este sentido mejoró la disposición del Código del Trabajo que establece que, pese a la reducción de la remuneración, como consecuencia de la reducción de la jornada, los aportes al Instituto Ecuatoriano de Seguridad Social que le corresponde al empleador deben realizarse sobre ocho horas de trabajo. Permite, además, separándose del límite fijado en el Código del Trabajo, que esta medida sea hasta por un año renovable por uno más.

Ha de entenderse que por ser emergente solo aplica como medida para salvaguarda las fuentes de empleo, amenazada por la emergencia sanitaria provocada por el Covid-19. Es decir, es una facultad del empleador en situaciones de caso fortuito o fuerza mayor, debidamente justificado. De producirse esta reducción emergente de la jornada de trabajo es obligación del empleador notificar al Ministerio de Trabajo respecto al período de reducción y nómina de trabajadores afectados. Además, para evitar que se burlen mayormente los derechos de los trabajadores, en caso de despido los cálculos de las indemnizaciones se los realizará en función de la última remuneración percibida por el trabajador anterior a la reducción de la jornada, en la forma ya señalada anteriormente, según el Art. 95 del Código del Trabajo.

Por último, se establecen igualmente algunas prohibiciones adicionales a los empleadores. Mientras dure la implementación de la reducción de la jornada, los empleadores no podrán reducir capital social de la empresa ni repartir dividendos obtenidos en los ejercicios en que esta jornada esté vigente. Los dividendos serán reinvertidos en la empresa, mediante el correspondiente aumento de capital.

Mediante Acuerdo 133, de 15 de julio de 2020, el Ministerio de Trabajo (2020) expidió las directrices para la aplicación de la reducción emergente de la jornada de trabajo establecida en la Ley de Apoyo Humanitario. Este Acuerdo no hace sino ratificar absolutamente el Art. 20 de la Ley en referencia. Las únicas diferencias son las innecesarias menciones, por una parte, de lo que habrá de entenderse por

caso fortuito o fuerza mayor. Ejemplifica indicando que se trata de aquellos casos en donde existan imprevistos imposibles de prever o generen imposibilidad de realizar el trabajo con normalidad y en consecuencia se deba reducir la jornada laboral ordinaria. Y, por otra, sobre la proporcionalidad para el cálculo de los beneficios económicos, que se los pagará en función de la jornada reducida. Decimos que se trata de menciones innecesarias puesto que ya la propia Ley de Apoyo Humanitario (2020), a través de la Disposición interpretativa indicó cómo deberá entenderse el numeral 6 del Art. 169, y la aplicación del principio de proporcionalidad para el caso de las remuneraciones, y demás beneficios de ley, está prevista en el Art. 82 del Código del Trabajo. Lo importante, en todo caso, es que este Acuerdo es coherente con lo que ya habíamos anotado, en el sentido de que la reducción de la jornada prevista en el Art. 20 de la Ley de Apoyo Humanitario, es diferente, e independiente, de la prevista en el Código del Trabajo en el Art. 47.1. Así, el Art. 8 del Acuerdo en cuestión, establece que no se podrá aplicar la disposición del Art. 20 a los trabajadores que ya se encuentren con una jornada reducida de conformidad al Código del Trabajo, mientras esta esté vigente.

3.2.4. Goce de vacaciones

Siguiendo con el análisis de las medidas previstas en la Ley de Apoyo Humanitario para salvaguardar las fuentes de empleo, tenemos la regulación respecto al goce de las vacaciones a las que tienen derecho los trabajadores. Así, en su Art. 21 establece que unilateralmente el empleador podrá, durante dos años a partir de la vigencia de la referida Ley, notificar al trabajador con el cronograma de vacaciones; o, establecer la correspondiente compensación económica de días de inasistencia como vacaciones devengadas. El AM-MDT 80-2020 (2020) ya revisado, también se refirió al goce de las vacaciones y le confirió al empleador la facultad de decidir unilateralmente sobre el período de las vacaciones y de notificarlas sin el tiempo requerido por el Código del Trabajo. No obstante, la Ley de Apoyo Humanitario (2020) adicionalmente fija el tiempo máximo por el cual aplica esta medida. En todo caso, estimamos que una vez más, se afectan los derechos de los trabajadores, privándoles de la facultad de

acordar con su empleador el período de sus vacaciones o de acumularlas, puesto que se le faculta al empleador para que decida unilateralmente, no solo el cronograma de vacaciones sino también la imputación, con cargo a vacaciones, de los días de inasistencia del trabajador. Pese a ello, podemos sostener que tal afectación es mínima, comparada con otras que se han dado con motivo de la emergencia sanitaria. Decimos que es mínima por cuanto si el cronograma de vacaciones fuera notificado con por lo menos tres meses de anticipación, sería lo que ya constaba en el Código del Trabajo. Así mismo, el imputar las inasistencias a vacaciones, tampoco resulta muy gravoso, dado que de esta manera no se le descontaría al trabajador el día de inasistencia, sino por el contrario, se le remuneraría como vacación; aunque ello implique que se le reducen los días ininterrumpidos de goce de vacaciones a los que tiene derecho.

3.2.5. Reformas al Código del Trabajo

3.2.5.1. Teletrabajo

Ya habíamos comentado que la modalidad del teletrabajo estaba regulada por el AM-MDT 190-2018 y posteriormente, durante la emergencia, se lo reguló como teletrabajo emergente, mediante el AM MDT 076-2020. Ahora, como consecuencia de la Primera Disposición Reformatoria de la Ley de Apoyo Humanitario se incorporó esta figura al Código del Trabajo, a continuación del Art. 16. Es decir, luego de los contratos por obra cierta, por tarea y a destajo, por lo que se le está considerando como un tipo de contrato según la forma de ejecución.

Se define al teletrabajo como una forma de organización laboral, que consiste en el desempeño de actividades remuneradas o prestación de servicios utilizando como soporte las tecnologías de la información y la comunicación para el contacto entre el trabajador y la empresa, sin requerir la presencia física del trabajador en un sitio específico de trabajo. En esta modalidad el empleador ejercerá labores de control y dirección de forma remota y el trabajador reportará de la misma manera (Ley de Apoyo Humanitario, 2020, Primera Disposición Reformatoria). Puede revestir una de las siguientes formas:

autónomo: cuando se utiliza el propio domicilio o un lugar escogido para desarrollar la actividad profesional, puede ser una pequeña oficina, un local comercial. En este tipo se encuentra la persona que trabaja siempre fuera de la empresa y sólo acude a la oficina en algunas ocasiones. Móvil: cuando el teletrabajador no tiene un lugar de trabajo establecido y cuyas herramientas primordiales para desarrollar sus actividades profesionales son las tecnologías de la información y la comunicación, en dispositivos móviles. Parcial: cuando el teletrabajador labora dos o tres días a la semana en su casa y el resto del tiempo lo hacen en una oficina. Ocasional: cuando el teletrabajador realiza sus actividades en ocasiones o circunstancias convenidas.

Se podrá pactar la modalidad del teletrabajo al inició de la relación laboral o con posterioridad. En todo caso, el empleador tiene la obligación de informar a la autoridad del trabajo de la vinculación de teletrabajadores.

Con ocasión de la regulación del teletrabajo, se introduce de manera adicional un nuevo derecho que ha surgido en los últimos años, como consecuencia de los avances de las tecnologías de la información y de la comunicación. Nos referimos al derecho a la desconexión, entendido como el tiempo durante el cual el teletrabajador no está obligado a responder comunicaciones, órdenes u otros requerimientos del empleador. Al respecto Pérez (2019) nos dice que:

> La revolución digital y los procesos de automatización y globalización han dado lugar a un fenómeno de conectividad permanente que está afectando a todos los ámbitos de la actividad humana, incluido el laboral donde las fronteras entre tiempo de trabajo y descanso se están diluyendo cada vez más.

Este incremento de la comunicación continua, impulsada por el empleo de dispositivos tecnológicos como herramientas para el desarrollo de la prestación de servicios laborales, propicia que muchos trabajadores se encuentren permanentemente "enganchados" al trabajo, lo que ha dado paso a lo que denomina "hiperconexión", lo que exige una pronta y adecuada regulación (Pérez, 2019). Consecuentemente, el derecho a la desconexión

supone que el trabajador podrá literalmente "desconectarse" de su trabajo, al menos por un período de 12 horas diarias, así como durante los fines de semana, feriados, permisos o vacaciones. Es decir, que a pretexto de los medios de interconexión con los que se dispone actualmente, y que son herramientas propiamente de trabajo, no se puede afectar el derecho todo trabajador al ocio y al descanso, y a destinar su tiempo libre a las actividades a quien bien tuviere, ya sea académicas, profesionales, familiares, deportivas, espirituales, etc. Descanso que debe ser reparador para garantizar la salud además de la adecuada motivación para el trabajo, razón por la cual de ello no solo se beneficia el trabajador sino el empleador por cuanto va a redundar en una más efectiva productividad.

3.2.5.2. Calificación del Covid-19 como enfermedad profesional

El Derecho del Trabajo y el de la Seguridad Social protegen a la persona trabajadora por riesgos del trabajo desde el primer día de sus labores. Se entiende riesgos laborales a los accidentes de trabajo y a las enfermedades profesionales. Ambos son eventualidades a las que están sujetos los trabajadores con motivo o con ocasión de trabajo que realizan. En caso de producirse tales eventualidades, los trabajadores tienen derecho a recibir por parte del Instituto Ecuatoriano de Seguridad Social la asistencia médica, quirúrgica, farmacéutica, a los servicios de prótesis y ortopedia y a subsidios en dinero, es decir a recibir pensiones por incapacidad parcial o total, según corresponda. En caso de no estar afiliado es el empleador quien debe cubrir todos los gastos. Si se produjera la muerte de la persona trabajadora como consecuencia de la enfermedad profesional, sus deudos tendrán derecho a percibir una indemnización equivalente al sueldo o salario de cuatro años.

A propósito de los numerosos contagios por parte de trabajadores en general, y de personal del área de la salud en particular, se dio paso a la discusión y análisis de si acaso debía o no considerarse en todos los casos al Covid-19 como una enfermedad profesional. Inicialmente, fue el Ministerio del Trabajo el que se pronunció mediante Resolución 022 de 28 de

abril de 2020. Sin embargo, de manera inmediata se rectificó dicha resolución, y así, al día siguiente, se expidió la Resolución 022 por medio de la cual se estableció que: la enfermedad del coronavirus (Covid-19) no constituye un accidente de trabajo ni una enfermedad profesional, a excepción de aquellos casos en los que se pudiera establecer, de forma científica y por métodos adecuados a las condiciones y a las prácticas nacionales, un vínculo directo entre la exposición a agentes biológicos que resulte de las actividades laborales realizadas por el trabajador. Posteriormente, se aprovechó la expedición de la Ley de Apoyo Humanitario para incorporar una reforma adicional al Código del Trabajo. Así, por medio de la Disposición Reformatoria Segunda de la mencionada Ley, se añade al final del artículo 363 del Código del Trabajo, que se refiere a la clasificación de las enfermedades profesionales, un nuevo numeral referido a la categoría: de síndromes respiratorios agudos causados por virus, para el caso de médicos, enfermeras, mozos de anfiteatro, de los departamentos de higiene y salubridad, sean del Estado, o de cualquier otra entidad de derecho público, o de derecho privado con finalidad social o pública, o particulares. (Ley de Apoyo Humanitario, 2020) Con ello se ha delimitado claramente que solo los profesionales y personal del área de la salud que fueren contagiados, con motivo o con ocasión del ejercicio de sus funciones y realización de sus actividades laborales, se puede considerar enfermedad profesional.

3.2.6. Disposición interpretativa sobre el caso fortuito o fuerza mayor

La causal de caso fortuito y fuerza mayor fue reiteradamente invocada por decenas de empleadores para poner fin a las relaciones laborales durante el estado de excepción por calamidad pública declarado en el Ecuador en el mes de marzo de 2020. La decisión la justificaban en la afectación sufrida por la emergencia sanitaria provocada por el Covid-19, y los consecuentes impactos en el ámbito laboral, especialmente con la suspensión de la jornada de trabajo, que obligaba en todo caso a seguir pagando las remuneraciones y aportes al Instituto Ecuatoriano de Seguridad Social, pese a la paralización absoluta de las actividades. Sin duda que muchos

casos resultaban evidentes y justificados, pero se dieron muchos despidos masivos que obligó a delimitar, vía una disposición interpretativa, el alcance de la causal 6 del Art. 169. El Art. 169 se refiere a las causas por las cuales puede un contrato individual de trabajo terminar. El numeral 6 del referido artículo dice: por caso fortuito o fuerza que imposibiliten el trabajo, como incendio, terremoto, tempestad, explosión, plagas del campo, guerra y, en general, cualquier otro acontecimiento extraordinario que los contratantes no pudieron prever o que previsto, no lo pudieron evitar.

Por medio de la disposición interpretativa, al referido numeral 6 del artículo 169 del Código del Trabajo (2005), se le dio el siguiente sentido:

> En estos casos, la imposibilidad de realizar el trabajo por caso fortuito o fuerza mayor estará ligada al cese total y definitivo de la actividad económica del empleador, sea persona natural o jurídica. Esto quiere decir, que habrá imposibilidad cuando el trabajo no se pueda llevar a cabo tanto por los medios físicos habituales como por medios alternativos que permitan su ejecución, ni aún por medios telemáticos.

Somos del parecer, no obstante, que esta ley interpretativa no resulta suficiente. Sostenemos que no es suficiente, primero por lo tardía, y segundo, porque no considera otras opciones intermedias, como podría ser la posibilidad de dar paso a una suspensión total. Por suspensión total nos referimos a la paralización de las actividades laborales sin pago de remuneración, al igual que lo que sucede en el caso de un paro. Es decir, dicha paralización podría ser por el tiempo, previamente acordado entre las partes, siempre que no supere un año (al igual que el resto de situaciones reguladas en el Código del Trabajo como suspensiones del contrato individual de trabajo). Con ello se hubieran evitado muchas liquidaciones de empresas y negocios, que se han visto asfixiados económicamente al tener que seguir pagando todas sus obligaciones, pese a encontrarse paraliza la actividad productiva o laboral.

En todo caso, cuando un juez determine que el empleador invocó de manera injustificada la causal de fuerza mayor o caso fortuito para terminar una relación laboral, se aplicará la indemnización por despido intempestivo prevista en el artículo 188 del Código del Trabajo (2005) multiplicada por uno punto cinco (1.5), (2do inc. Art. 17); es decir, si el trabajador hubiere laborado hasta tres años, percibirá por concepto de indemnización un monto equivalente a tres meses de remuneración; si hubiere trabajado más de tres años percibirá una remuneración por cada año de servicios. Consideramos acertado el condenar al empleador inescrupuloso con un recargo del 50% del monto de las indemnizaciones cuando alegando injustificadamente la causal 6 del Art.169 pone fin a la relación laboral. No es de ninguna manera admisible que se valgan de la emergencia sanitaria y la crisis económica provocada por el Covid-19, para reducir personal o despedir a trabajadores que tenían muchos años de servicios, con el claro propósito de evitar indemnizaciones, y aun, eventuales jubilaciones a cargo del empleador. El juez, como única autoridad competente, será el responsable de calificar si efectivamente la causa de la liquidación del negocio, y por ende de la terminación de las relaciones laborales, se debieron a la situación derivada del Covid-19.

4. INOBSERVANCIA DE PRINCIPIOS DEL DERECHO DEL TRABAJO

Hemos comentado las regulaciones, muchas veces erráticas, que por motivo de la crisis sanitaria fueron necesarias. Hemos también anticipado que muchas de ellas han sido claramente violatorias principios laborales; concretamente, a los principios de intangibilidad, no regresividad, progresividad, irrenunciabilidad; además de los de oportunidad e integridad referidos a los derechos económicos de los trabajadores. Fundamentemos nuestra aseveración, pasando breve revista a cómo cada uno de los referidos principios han sido flagrantemente inobservados de manera sistemática.

El principio de intangibilidad implica que los derechos de la persona trabajadora no pueden ser desconocidos ni desmejorados por ninguna ley, convenio o contrato colectivo.

Es decir que los derechos laborales ya reconocidos y adquiridos por los trabajadores no pueden ni deben tocarse, razón por la cual sirven como un mínimo a partir de los cuales las normas posteriores deberán mejorar las condiciones, pero nunca desmejorarlas. Al decir de Andrés Páez (2019), se entiende por intangibilidad de los derechos laborales "que los mismos no pueden ser conculcados, cuando de forma definitiva e irrevocable se han incorporado al patrimonio del trabajador y, una vez conformado el derecho subjetivo, este no puede ser modificado por nuevas legislaciones o por cualquier cambio posterior" (p. 60). No obstante, la reducción emergente de la jornada de trabajo, prácticamente igual a la que consta en el Art. 47.1 del CT –reducción excepcional de la jornada de trabajo-, con la consecuente reducción de la remuneración y demás beneficios económicos, es claramente contraria a este principio.

Los principios de progresividad y no regresividad implican, según Corsini:

> La garantía de la conquista de un estadio [...] asegurando un mínimo de dignidad existencial a los trabajadores, es decir, funciona como una válvula del sistema, que no permite que se pueda retroceder en los niveles de conquista protectorias logrados, e impide el retroceso a condiciones propias de períodos históricos que registran un mayor grado de desposesión. (citado por Páez, 2019, p. 61)

Por ello el mismo Páez (2019) concluye que "la noción de progresividad impide que se retroceda sobre lo que, hasta el momento se ha alcanzado, en materia de derechos laborales, entendiendo por retroceso un empeoramiento de los mismos" (p. 62). Aunque resulte obvio que en épocas de crisis económicas no se puede pretender incrementos o mejoras de los beneficios económicos, es precisamente en esas mismas épocas en las que se debe garantizar estabilidad laboral y económica a las personas que viven de sus ingresos fruto de un contrato de trabajo. En épocas de crisis, los trabajadores, ya parte débil de una relación laboral, se encuentran en situaciones de mayor vulnerabilidad a quienes es necesario garantizarles protección y el no desmedro de sus derechos. No obstante, se

han inobservado principios fundamentales del Derecho del Trabajo que han mermado la protección a la parte trabajadora. Se ha dado una regresión de derechos el permitir por ejemplo que el empleador, unilateralmente, resuelva la disminución de la jornada laboral, el cronograma de vacaciones, la contratación a plazo fijo a través de la figura del contrato especial emergente (aunque en este caso ha de entenderse que aplica solo para los nuevos contratos). Todo ello, por supuesto, sin desconocer que es necesario asegurar las fuentes de empleo, y por ende flexibilizar las regulaciones a fin de que los empleadores, si acaso no aumenten, al menos mantengan los puestos de trabajo, en lugar de optar por el cierre o la liquidación de la empresa o negocio. La contracción de la economía ha impactado fuertemente a todos los sectores, pero, como siempre, los más afectados son quienes menos tienen y aquellos que dependen absolutamente de sus remuneraciones.

El principio de la irrenunciabilidad, impide que los trabajadores renuncien a sus derechos, en virtud de que se trata de la parte débil de una relación laboral, y por ende muy vulnerable frente a eventuales presiones o abusos por parte de los empleadores. Rosa Elena Bosio (2019) sostiene que cuando un trabajador renuncia a sus derechos es por "falta de capacidad de negociación o ignorancia, conminado por la desigualdad jurídica-económica existente con el empleador, con el objeto de preservar su fuente laboral", por lo que la renuncia en tales casos carecería de validez" (p. 25). Por ello, los acuerdos para la preservación de las fuentes de trabajo previsto en la Ley de Apoyo Humanitario, en los casos que se los haya suscrito, claramente adolecen de un vicio del consentimiento que es la fuerza. No cabe la menor duda de que los trabajadores se han visto constreñidos a aceptar condiciones en franca desmejora de las condiciones económicas, con el único afán de mantener un ingreso, aunque escuálido. Los trabajadores se han visto forzados a renunciar, expresa o implícitamente a varios de sus derechos y resignarse para conservar su puesto de trabajo. Nos referimos a los derechos a mantener su remuneración íntegra e inalterable; a mantener su jornada de trabajo completa (ya sea de ocho horas diarias o la parcial que hubieren acordado al inicio de la relación laboral), aun cuando de todos modos

implique seguir trabajando tanto a más que antes; a su derecho a la intimidad familiar y el derecho al ocio, cuando se ha visto obligado a trabajar desde su casa, aún sin contar con los equipos ni medios necesarios, a toda hora, inclusive los días de descanso.

Los principios de integridad y oportunidad se refieren a la necesidad de que la remuneración llegue a cada trabajador de manera completa y a tiempo, es decir, conforme al monto y tiempo de pago acordados y conforme a la ley. Por lo tanto, el monto no puede ser de ninguna manera inferior al básico y los plazos para los pagos no pueden ser mayor a una semana o de un mes, según se refiera a salario o sueldo, respectivamente. Sin embargo, reiteramos, el permitir, por una parte, la calendarización de pagos de las remuneraciones y por otra la reducción de la remuneración, se han inobservado flagrantemente tales principios, aun cuando tales medidas pudieron estar justificadas en una situación absolutamente excepcional, y con el propósito de evitar un mal mayor, como sería la terminación de las relaciones laborales, o incluso la liquidación de los negocios.

Al respecto hacemos eco de las declaraciones del Observatorio de la Organización Internacional del Trabajo en su quinta edición dedicada al Covid-19 y el mundo de trabajo, de 30 de junio de 2020, en el sentido de que: "la pandemia de la COVID-19 no justifica ninguna restricción de los derechos fundamentales en el trabajo consagrados en las normas internacionales del trabajo, y el pleno respeto de esos derechos constituye una condición previa para entablar un diálogo social eficaz" (Observatorio de la OIT, 2020). Por su parte, y en este mismo sentido, aunque de manera atenuada, la Comisión Interamericana de Derechos Humanos (CIDH) y su Relatoría Especial sobre Derechos Económicos, Sociales, Culturales y Ambientales (REDESCA), sostienen que:

> Cualquier medida de naturaleza restrictiva o regresiva con respecto a los DESCA, sea adoptada y aplicada de forma transparente, tras un cuidadoso análisis de las alternativas existentes. De adoptarse, dichas medidas deben estar justificadas desde un enfoque de

> derechos humanos con el debido análisis de impacto en los mismos, así como de la más eficiente utilización de los máximos recursos disponibles. (OEA, 2020)

5. ¿HACIA UNA "NUEVA NORMALIDAD"?

Una vez que se han implementado medidas emergentes para afrontar el inesperado brote del Covid-19 en el Ecuador, paulatina y progresivamente se está retornando a las actividades cotidianas, dejando atrás el confinamiento, en esta nueva etapa del distanciamiento social. En este escenario es fundamental considerar que la salud y seguridad ocupacional debe estar debidamente garantizada a todas las personas trabajadoras. De allí que el Comité de Derechos Económicos, Sociales y Culturales de las Naciones Unidas dentro de su Declaración sobre la pandemia de Covid-19 ha recomendado que los Estados adopten medidas para garantizar que se reduzcan al mínimo los riesgos de contagio. Hasta que se adopten tales medidas, sostiene el Comité, no se puede obligar a los trabajadores a trabajar y, a su vez, éstos deberían estar protegidos contra las sanciones disciplinarias o de otro tipo por negarse a trabajar sin la protección adecuada. Además, se recomienda que los Estados adopten medidas urgentes para proteger los empleos, las pensiones y otras prestaciones sociales de los trabajadores durante la pandemia, y así mitigar sus repercusiones económicas. (Naciones Unidas, 2020)

En este sentido, para efectos de la reactivación de las actividades laborales, se dispuso, mediante Decreto Ejecutivo 1074 (2020, Art.5), que el Ministerio de Trabajo realice los controles e inspecciones correspondientes a fin de que en el desarrollo de la jornada laboral se respeten tanto las medidas de bioseguridad necesarias, así como los derechos que deben garantizarse en toda relación laboral. Lo dicho se concretó en el AM MDT 093-2020, de 3 de mayo que fija las directrices para el retorno progresivo al trabajo. Entre tales directrices resulta conveniente destacar que la adopción de medidas de prevención corresponde al empleador. En este sentido, lo primero que debe hacer la parte empleadora que pretenda reiniciar las actividades

laborales es observar de manera estricta la Guía aprobada por el Comité de Operaciones de Emergencia Nacional (COE). Será, por ende, responsabilidad del empleador: tomar las medidas de seguridad y salud en el trabajo, según corresponda a cada actividad. Además, prever la movilidad y logística a fin de que las personas trabajadoras arriben a sus lugares de trabajo, y una vez terminada su jornada laboral retornen a sus hogares, de manera segura, minimizando las posibilidades de contagio. Corresponde así mismo al empleador determinar los horarios, turnos, fechas y grupos de trabajadores para iniciar progresivamente las actividades en jornadas prolongadas o de recuperación. Entre las directrices consta también la necesidad de continuar con la modalidad de teletrabajo, siempre que sea posible, dando prioridad a los trabajadores en situación de vulnerabilidad. Se consideran tales a mujeres embarazadas, personas con discapacidad, mayores de sesenta y cinco años, o que adolezcan de enfermedades catastróficas o de alta complejidad.

Por su parte, la Dirección de seguridad, salud en el trabajo y gestión integral de riesgos del Ministerio de Trabajo expidió la guía de actuación para la prevención y control del Covid-19, durante la jornada presencial de los trabajadores. Esta establece los niveles de riesgos ocupacional (muy alto, alto, medio, bajo). Además, prescribe los protocolos para el manejo de trabajadores con casos sospechoso, probable y confirmado de Covid-19. (Ministerio de Trabajo, 2020)

Desde la declaratoria de emergencia sanitaria provocada por el Covid-19 hemos oído con gran insistencia la expresión "nueva normalidad", para referirse a la forma en que se desarrollará la vida cotidiana a partir del retorno progresivo a las actividades laborales y productivas, según la semaforización que para el efecto se ha establecido. Sin embrago, es preciso advertir que, si bien será una nueva realidad que implicará cambios en la forma de actuar, de hacer, de trabajar, de relacionarse, e inclusive de sentir, ello no será una situación permanente. En este sentido la filósofa Corina Dávalos (2020) sostiene que tanto el término de "normalidad" como el de "nueva" son absolutamente inadecuados para referirse

a la situación en la que se vive luego de la declaratoria de la pandemia. El primero, por cuanto "normal" es lo que se ajusta a una norma. El segundo, porque alude al inicio de algo, que se experimenta por primera vez. Si se suman ambos términos resultará que "esta situación infrecuente e insólita es el inicio de algo que tomará posesión de nuestra cotidianeidad, sin que nadie lo perciba como inaceptable". Más aún si se considera que con ello se está generando un "marco mental" que solo deja ver lo que aparece en ese contorno, y así se ve la realidad tal como se la presenta. Al definir un marco mental, nos dice Dávalos (2020), se permite "a los gobiernos y medios que modifiquen nuestra manera de acercarnos a mirar y entender una realidad". Ese cambio de marco, según el lingüista George Lakoff, es un cambio social. Por lo tanto, advierte el peligro que supone la "nueva normalidad", ya que de manera insospechada con tal expresión se está formateando la percepción de lo que puede aprobarse como tolerable en el largo plazo. (citado por Dávalos, 2020)

En esta nueva etapa, a más de las medidas de bioseguridad que permitirán el retorno progresivo y seguro a las actividades laborales y productivas, será necesario implementar de manera urgente y prioritaria los mecanismos tendientes a una acelerada reactivación de la economía y de los empleos. Consecuentemente se espera, en el mundo del trabajo, como se expresa en la Ley de Apoyo Humanitario a propósito del contrato especial emergente, que se den nuevas inversiones o líneas de negocio, productos o servicios; ampliaciones o extensiones de los negocios, o modificación de los giros de los negocios; que se incremente la oferta de bienes y servicios por parte de personas naturales o jurídicas, nuevas o existentes. En definitiva, que se diversifiquen las fuentes de trabajo, que se generen nuevos emprendimientos, que se implementen suficientes estímulos para fortalecer las pequeñas y medianas empresas, a fin de que más personas puedan acceder a ingresos regulares y suficientes que les permitan superar los estragos de esta dura crisis y gozar de una vida digna.

6. REFLEXIONES FINALES

La crisis provocada por el Covid-19 ha marcado un antes y un después en las relaciones laborales. Hasta antes de la declaratoria de la emergencia sanitaria, los trabajadores luchaban arduamente para no solo defender sus derechos, conquistados la gran mayoría de ellos a costo de sangre, sino para mejorarlos. Reclamaban cuando se cometían injusticias y sobre todo cuando se inobservaban las disposiciones del Código del Trabajo, los contratos, ya fueran individuales o colectivos, y fundamentalmente los principios del Derecho del Trabajo, cuya razón de ser es la protección de la parte débil de la relación laboral. Ahora los esfuerzos se limitan a los desesperados intentos por conservar la fuente de ingresos, resignando para ello, en muchos de los casos, sus derechos fundamentales.

La crisis también aceleró algunos cambios que se esperaban se fueran implementando de manera paulatina, en los diferentes órdenes de la vida social. Mencionaremos exclusivamente a los que corresponden a nuestro ámbito de análisis. Así, dichos cambios se presentaban desde hace algunos años como retos inaplazables del Derecho del Trabajo, producto de los avances de la ciencia y la tecnología y la cuarta revolución industrial para poner al mundo del trabajo acorde a las demandas de una acelerada e incontenible globalización y automatización. Nos referimos, por ejemplo, al impulso y aceptación de los medios telemáticos para la realización de las actividades laborales. Esto ha dado lugar inclusive al surgimiento de un nuevo derecho, el de la desconexión. Este nuevo derecho:

> Se perfila como un aspecto clave para el trabajo propio de la era digital, donde las garantías de seguridad y salud sólo quedarán fortalecidas con la incorporación de nuevos límites, un cambio de mentalidad y una regulación específica. [...] lo que obliga a rediseñar la jornada laboral, a evaluar el desempeño en función de objetivos, y a aceptar la tendencia hacia una mayor autonomía del trabajador, puesto que los tradicionales parámetros de tiempo y lugar de trabajo y de descanso se difuminan. (Pérez, 2019)

Así, "la inmersión en el mundo digital ha cambiado por completo la forma en la que se desarrolla la vida laboral (Pérez, 2019). No solo ello, sino que también obliga a asumir la realidad de que el trabajo va perdiendo cada vez más terreno debido a múltiples factores, que, al decir de Súpito (citado por Palomeque, 2011): "han contribuido a la erosión del poder de las conquistas obtenidas basadas en un trueque entre subordinación y estabilidad, también en el ámbito social". (p. 39) En esa tendencia es que las regulaciones emergentes que se expidieron para hacer frente a la crisis provocada por el Covid-19, inobservaron algunos principios esenciales del Derecho Laboral, concretamente, los principios de intangibilidad, progresividad, no regresividad y de irrenunciabilidad de los derechos de los trabajadores; del principio de la integridad y oportunidad de las remuneraciones; aunque dadas las circunstancias, muchas de tales medidas se consideraron legítimas.

La Organización Internacional del Trabajo, por su parte, sugiere algunos otros retos que serán necesarios asumir por parte de los gobiernos, para propiciar la creación de empleo, perdidos con motivo de la pandemia. Entre tales retos se encuentran: apoyar a los grupos vulnerables y los más afectados con el fin de lograr un mercado laboral más justo; y, fortalecer el diálogo social y el respeto de los derechos en el trabajo. Para ello será necesario remitirse a la Declaración del Centenario de la OIT sobre el futuro del trabajo adoptada en 2019, en virtud de la cual se establece un enfoque centrado en el ser humano para aumentar la inversión en la capacidad de las personas, las instituciones laborales y el empleo sostenible y decente en el futuro. Así también, ha fijado cuatro pilares fundamentales para abordar la crisis de la COVID-19 de conformidad con las normas internacionales del trabajo. Estos son: el estímulo de la economía y el empleo; el apoyo a las empresas, los empleos y los ingresos; la protección a los trabajadores en el lugar de trabajo; y, la búsqueda de soluciones mediante el diálogo social. (Observatorio OIT, 2020)

Por todo lo dicho, se hace inminente repensar el Derecho del Trabajo. Es necesario que ese nuevo derecho se encuentre a tono no solo con los efectos de la pandemia mundial y el consecuente requerimiento de una pronta

reactivación económica, sino, sobre todo, acorde con un futuro que presenta muchos más desafíos, como son, la globalización, la tecnificación, y por ende las nuevas modalidades y condiciones de trabajo, fruto de la cuarta revolución industrial y el incremento del trabajo informal y autónomo. Millones de empleos en todo el mundo se perderán si no se da paso a la profunda transformación que exige la automatización de los diferentes procesos productivos y laborales. Es necesario, por lo tanto, que el Derecho Laboral acompase dichos cambios y se adapte a esas nuevas formas de organización del trabajo, sin perder su razón de ser, que es la protección de la parte trabajadora, pero no solo entendida de una relación laboral (dependiente y remunerada), sino de toda persona que se gane la vida trabajando. Esta redefinición o modernización del Derecho del Trabajo, "refundación institucional", al decir de Palomeque (2011), se viene debatiendo desde hace algunas décadas, como uno de los desafíos para entrar en el S XXI. (p. 40) Ello supone una revisión total del sistema normativo laboral y la flexibilización de los contenidos regulatorios, lo que "encierra en realidad transformaciones de envergadura y alcance desiguales, por lo que su aceptación [...] no debe ser necesariamente homogénea y funcional" (Palomeque, 2011, p. 40). En todo caso, concluye el mismo autor, que "la existencia de transformaciones institucionales [...] originadas por causas políticas y económicas es absolutamente consustancial al Derecho del Trabajo, de las que ha dado muestra permanente en sus diferentes expresiones históricas, y que derivan de modo esencial de la propia función social de respuesta de la norma laboral frente a la realidad social objeto de regulación". (Palomeque, 2011, p. 47)

Lastimosamente, pese a todo lo dicho, lejos de dar paso a una transformación profunda de este Derecho, de sus instituciones y regulaciones, lo que se ha realizado, particularmente en el Ecuador, han sido reformas desarticuladas y anacrónicas, y las últimas simplemente emergentes, a propósito del Covid-19 como era de esperar, manteniendo en el fondo un statu quo. Situación que no ha permitido esa urgente y constante adecuación del ordenamiento laboral a la realidad económica permanentemente cambiante. En definitiva, el

Derecho del Trabajo está obligado a refundarse para adaptarse a las exigencias del trabajo del futuro y del futuro del trabajo, pero sin perder su razón de ser, como parte del Derecho Social, que es, “proteger y dignificar a las individuas social y económicamente débiles” (Stafforini, citado por Bosio 2019, p. 10). Se requiere, en definitiva, que el nuevo Derecho del Trabajo se proyecte al futuro del mundo del trabajo con una mirada diferente, innovadora y progresista para, centrado en el ser humano, ser más justo, equitativo e inclusivo.

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Smart Regulation in times of COVID 19: An introspective preliminary analysis for its application in Ecuador

Smart Regulation en tiempos de COVID 19: un análisis introspectivo para su aplicación en Ecuador

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ABSTRACT: Better regulation is a public policy that governments implement to improve the quality of life of their citizens. These policies bring significant benefits to all market players, among the most palpable are innovation, administrative simplification, a clear commitment by the government, and competitiveness. A fundamental entity for the development of this type of regulation is the Organization for Economic Cooperation and Development (OECD), whose main objective is to create policies that improve the quality of life of citizens around the world. Among the members of this organization are first world countries such as the United States and Spain, as well as third world Latin American countries such as Mexico and Colombia, whose government administration serves as a model for the Ecuadorian people. It is because, without considering that their economies are not as large, developed, and stable,

they have managed with the commitment, perseverance, and responsibility to be supported by this international institution. Nowadays, the problem of over and deregulation that has remained in Ecuador. Since the beginning of its history, it serves as an axis of study to propose the implementation of regulatory improvement within its political system. In order do this, it must be considering the principles of governance, proper preparation for its application, and the professionalism of all market players.

KEYWORDS: quality of life, law reform, development policy, cost reduction, development strategies.

RESUMEN: La mejora regulatoria es una política pública que los gobiernos implementan para mejorar la calidad de vida de sus habitantes. Esta política trae grandes beneficios hacia todos los agentes del mercado, entre los más palpables están la innovación, la simplificación administrativa, el compromiso transparente por parte del gobierno, y la competitividad. Una entidad fundamental para el desarrollo de este tipo de regulación es la Organización para la Cooperación y el Desarrollo Económico (OCDE), la cual tiene como objetivo principal el crear políticas que mejoren la calidad de vida de los ciudadanos alrededor del mundo. Entre los miembros de esta organización se encuentran países de primer mundo tales como, Estados Unidos y España, así como también países latinoamericanos de tercer mundo como México y Colombia, cuya administración gubernamental sirven de modelo para el pueblo ecuatoriano. Esto se debe a que, sin considerar que sus economías no son igual de grandes, desarrolladas y estables, han logrado con el compromiso, perseverancia y responsabilidad ser respaldados por esta institución internacional. En la actualidad, la problemática de la sobre y desregulación que se ha mantenido en Ecuador desde el inicio de su historia sirve como un eje de estudio para proponer la implementación de la mejora regulatoria dentro de su sistema político. Para ello, deberá tomar en cuenta los principios de gobierno, una buena preparación para su aplicación, y el profesionalismo de todos los agentes del mercado.

PALABRAS CLAVE: calidad de vida, reforma jurídica, política de desarrollo, reducción de costes, estrategias de desarrollo.

INTRODUCTION

Some of the most convenient ways of defining the need for regulatory quality are the problems that exist in legal systems. Most of the times, antinomies, the abbreviation of laws, unfamiliarity with terms or legal provisions lead the creation of obstacles that avoid achieving social, economic and administrative well-being. The vast majority of these problems are due to the lack of the regulatory improvement mechanism in the creation of transparent and efficient public policies.

However, what do we call regulatory improvement? How can this concept be applied? Regulation is a manifestation of the power of those who have command over a defined territory. This type of externalization of power is translated into the procedure of creating norms to regulate the behaviour of a determined population. Within the field of regulation, it is vastly extended to different areas of society such as: social, administrative and economic. It is essential to analyze that this type of control is framed in two ways, the first a poor regulation. Meanwhile, the second materializes a regulation based on two objectives: the elimination of unnecessary policies and the simplification of administrative behaviour. This search for efficiency and effectiveness arises regulatory improvement as a demanding process whose focus is aimed at promoting the improvement of administrative processes and the quality of life of citizens.

The approaches to this study will involve the theme of regulatory improvement, the public policy that is the synonym of innovation as long as it is aligned with the accurate creation and application processes. Moreover, regulatory improvement also becomes versatile. It applies to all sectors of society from education, or the market, through the simplification of procedures that favour the citizens' lifestyle, to the point of carrying out constitutional reforms, strengthening competent institutions and promoting the participation of all the nation's members.

Nevertheless, under what circumstances the implementation of regulatory improvement is allowed? Governments understand the prevailing need to create specialized institutions in this type of regulation in order to ensure the stability of the market, the form of government and each of the economic agents. As the leader of this project, the Organization for Economic Cooperation and Development (OECD, n.d.), is presented as an international organization that was born in the sixties to focus on the development of beneficial policies orientated to enhance the lives of the world's citizens; its objective is to establish international standards that guarantee the best policies globally. That is the reason why it is a privilege that only the world's developed countries such as Australia, Canada, USA, Switzerland, Germany have reached and positioned themselves within the thirty-eight members of this organism. It must be mentioned that for certain Latin American and African countries that have been candidates, and now OECD's members were a real challenge and a demonstration that, regardless of the social, political, or economic situation of the nations, they can achieve it.

Thanks to this brief section and alluding to the theme that the academic article will address, Ecuador is a Latin American country with a history full of shortcomings at the government level that has set aside its purpose, which is to improve the quality of life of its citizens through public policies. Unfortunately, the lack of a leader oriented to the service of the people has caused an accumulation of corrupt regulatory decisions, triggering problems of scarcity of transparency, and complex processes in administrative procedures. Thus, the following questions arise, to what extent could Ecuador be part of this organization? What are Ecuador's development strategies to guarantee compliance with regulatory improvement?

Throughout this document, the economic, social and political situation of Ecuador, the incipient public policies created to introduce regulatory improvements and the current challenge for Ecuadorians of the 21st century will be considered to continue promoting efficient government responses to streamline administrative procedures. For this,

the context of Mexico and Colombia as countries that have entered the field of this type of regulation, the requirements to be part of the international institution specialized in improving public policies, OECD; as well as proposals that could empower Ecuadorian public officials, to construct a country with the spirit of excellent regulatory quality, efficiency and transparency. Some of these proposals will be guided to the Covid-19 pandemic, which has affected the whole world and for which it is imperative to create improvements to better cope with the current crisis.

I. THE OECD'S WORLD VISION FOCUSED ON A LATIN AMERICAN CONTEXT

The Organization for Economic Cooperation and Development, OECD, is an international organization that operates among thirty-seven member countries. The OECD was created in 1960 in order to maintain and consolidate the objectives set by the former, European Organization for Economic Cooperation, OECE (OECD, 2012, p.15). This intergovernmental institution is responsible for encouraging and ensuring the formulation of feasible and advantageous economic, social and administrative public policies. In order to be part of the countries that make up the OECD, they must comply with three aspects: being a democracy, respecting human rights, and having an open market economy. In turn, the OECD encourages the generation of changes in the classic government strategy towards undertakings aimed at developing a country.

1.1 THE CHALLENGE OF BEING PART OF THE OECD

Why is it challenging for Latin American countries to become members of the OECD? Latin America, unlike the states of the first world, has maintained a history full of obstacles that obstruct its path to development. Among the main problems, the dependence of underdeveloped nations on the economic leaders such as the United States, China, Japan, Russia, Germany, the United Kingdom, France, has caused

a relationship that does not allow the 'little ones' to ensure prosperous financial management, in other words, Ecuador, Bolivia, Paraguay, Uruguay, and other Latin American states have settled for maintaining their monetary stability through foreign capital and have forgotten to innovate their production methods or encourage mechanisms for technological growth, administrative improvements, reduction of poverty levels, among many more. (OECD, n.d.)

Additionally, another factor is the disproportionate relationship between excess imports and nullity of export of national products, which leads to the persistence of inequalities in society and obstructed progress. It is worth mentioning the inadequate distribution of state wealth and resources. Moreover, the basis of this fundamental structural problem that remains in these countries is unproductiveness, and social, institutional and environmental vulnerability.

Alluding to the lack of productivity, the types of products that Latin America develops have not changed for a long time, which reaffirms the notion that there is a lack of innovative ideas and incentives for change. For example, most of the countries of this continent have based their economy on the sale of raw materials, mining and oil extraction; even though these sectors are those with the highest competition in the world market. Similarly, there are no regulatory policies that guarantee the well-being of citizens, government efficiency, care for national products and the environment. Due to these reasons, it is a challenge for underdeveloped countries to belong to an international organization called OECD.

However, is it impossible to be a member of this organization? One of the OECD's main objectives is to diversify the productive sectors in Latin America, innovate and prepare state projects in each of these countries to achieve the most significant sophistication of administrative processes and the optimum quality of public services and government. One of the ways to achieve this goal is to improve their level of cooperation with other countries and to carry out the

necessary specializations so that once within the OECD, they only strengthen and fine-tune the processes they are already undertaking.

For a country to be a candidate or an OECD member, is required a constant process. Being part of the OECD not only involves fulfilling the mission, vision and values that the organization has, but also means to assume the responsibilities of having the status of a member of the organization. There are two ways to make up the OECD, the first is to present the candidature, and the second is to be invited by the Council of the Organization for membership. Subsequently, they perform an exam, in which they evaluate their practices on regulatory improvement and compare them with the practices that are considered the best ones. They also evaluate the capacities that the candidate country has to implement the organization's norms.

Moreover, to be a formal member, the country must ratify the accession (OECD, n.d.). In this way, it is seen that joining the OECD is not a simple process, but a demanding one where the country is fully committed to creating a culture of regulatory improvement policy and meeting all the objectives. As a curious fact, it can be mentioned that Lithuania was the last country to join the organization in 2018.

However, the notion of being a member of the OECD involves here some important peculiarities such as the procedure of previously being a candidate before becoming an official member. Currently, the new candidate to join the OECD is Costa Rica, a Latin American country that was invited on May 5, 2020, to be an official member of the OECD (OECD, 2020). In short, Latin America is a continent that has the possibility of improving and overcoming its precarious conditions, as it has been demonstrated by the four OECD members that have roots similar to Ecuador.

1.2 COLOMBIA AND MEXICO: SUCCESSFUL IN REGULATORY IMPROVEMENT

Mexico, Colombia, and Chile are Latin American countries that are part of international cooperation created in order to build better lives, allow taxpayers to save, and promote liberal and more resilient societies and economies. (OECD (n.d.) para. 5) Undoubtedly, being a member of the OECD has excellent benefits for the countries that comprise it, among these are analysis and monitoring tools for the economy, society and environmental policies. Additionally, the OECD provides best practices and the search for standard solutions for countries with similar situations and realities; such as dialogue, internal or group consultations, and a consulting body, among others (OECD, n.d.).

The OECD understands that Latin America is a continent that needs to learn about politics due to its significant difference with countries that have much more developed economies. For this reason, it is essential to take into account the barriers that exist regarding the precarious infrastructure in Information and Communication Technologies (ICTs), the few opportunities for digitization education, and the high corruption that exists in governments. According to Corruption Perceptions Index 2019, published by Transparency International, an organization focused on society free of corruption; reveals in a study that the American continent has a score of 43/100 in the level of corruption, 100 being a clean society and 0 highly corrupt. Furthermore, it mentions that the region has failed to make significant progress in fighting corruption. Taking into account the Latin American descriptions already mentioned, we will proceed to make a brief description of the operation of the regulatory improvement in Mexico and Colombia.

Mexico also known as the United Mexican States, is a federation that is organized in the form of a representative, democratic, federal, and social republic. It is made up of autonomous states, its capital is Mexico City, and they are governed by the principles of its federal constitution (Navarrete Vela, 2008, p.132). According to this normative text, public

power and sovereignty belongs to the people and are executed through the division of powers: executive whose mandate is held by the President; legislative through Congress; and judicial by theSupreme Court of Justice. Regarding political representation, Mexico has a multiparty system, in which there is a plurality of political parties and, therefore, citizen representation. It is regulated by electoral institutions such as the National Electoral Institute, the Electoral Tribunal and Prosecutor's Office (Gómez Díaz de León, 2015, pp. 40 - 42).

Like many other countries, most of the public policies that have been created are mostly not efficient since they fail to maximize their benefits and generate higher costs. However, in 1989 the Government of Mexico began a process of regulatory improvement that has been consolidating as a systematic activity for the public administration of Mexico since it generates clear regulations, simplifies procedures and services, establishes institutions aimed at obtaining the maximum value of all resources and the optimal functioning of the commercial, industrial, service and human development sectors (CONFEMER, 2017, pp. 13 -15).

To start this process, Mexico was guided by the OECD, which proposes four steps for the application of regulatory governance: deregulation, regulatory improvement, quality assessment and the cycle of regulatory governance (Carballo, A. 2012). As a first step, the deregulation process began in the 1980s and ended in the mid-1990s when Mexico evaluated the excessive and unnecessary regulation that affected the freedoms of economic agents at the national level. Nevertheless, working more on conflicts, Mexico analyzed how obvious problems attacked the administrative system, such as the lack of principles of transparency, anti-competitive practices and corruption. Along the same line, different authors identify the broad benefits of deregulation, such as Correa and Girón (n.d.) who put forward the idea of deregulation that causes a positive impact and set an example about financial deregulation. It is known that the regulatory liberation of financial systems allows the flow of capital and innovation, which certainly favours

a society with control of its freedoms that with a proper orientation will lead to a development in society (para. 7). Mexico understood that simple changes at different sectoral levels would allow a great dynamism of activities and a reduction in regulatory problems.

However, a reform or also called regulatory improvement began in the second half of the 90s and the first of the 2000s. This reform progressively influenced different institutions through the deconcentration of power. One evident change was the administrative modernization of the Mexican urban municipalities. Among the advantages, Tamayo and De Haro report that "the number of federal business procedures decreased by more than 45% between 1996 and 1999" (p.4) On the other hand, paperwork was also reduced thanks to the essential requirements that were requested, improved performance and reduced transaction costs. By maintaining basic rules of the game in a strict sense, avoiding the requirement of excessively regulatory licenses or authorizations and evaluating the information that is necessary for it to enter the system, a change begins that will result in the effectiveness and streamlining of processes. With this first approach, it is understood how the implementation of regulatory improvements at the municipal government level can generate positive change within the entire state organization, not to mention whether efficient regulation extends to the entire country.

Starting from the two previous steps, Mexico continued with the evaluation of the quality of regulatory policy during the second half of the 2000s. This assessment has a rather demanding methodology that mainly includes two objectives. The first is the identification of the information that is mandatory in a procedure such as the requirements, the documents, proceedings, declarations, among others. The second is the estimation of administrative burdens which can be monetary or the cost of time (Presidency of the Council of Ministers, n.d.). The aim is to continue with a simplification of processes, in addition to a periodic evaluation called the regulatory quality analysis (ACR). Then, it should be understood that an

evaluation of regulation undoubtedly requires the intervention of tools such as ex-ante controls, ex-post controls, cost-benefit analyzes, assessment of the applicability of principles, among others.

Finally, during the decade of 2010, the institution of the regulatory governance cycle was made up of five steps, and four fundamental axes called the 4CS (consultation, coordination, cooperation, communication). Within these stages, the first one is planning; next developing policy strategies and public consultation; then review and design; after implementation and compliance; and finally, evaluation and monitoring. This process begins with goals, resources, capabilities and tools, continues with expert opinions and the search for political support. During the review and design stage, old policies are evaluated, and new ones are built to continue innovating. The next step is materialized with the applicability of the policies, and their level of compliance is monitored. Finally, the results become tangible after a constant and persistent control that always seeks the scoop for better regulation (Carballo, A.2012.p.35).

Bearing in mind the transition of implementation of regulatory improvement in Mexico, the General Law of Regulatory Improvement and the reforms of articles 25 and 73 of the Mexican Federal Constitution were endorsed, which consent to the creation of the National System of Regulatory Improvement in which, Mexico will display new regulatory practices, as well as policies, institutions, and tools; that go from the planning to the emission, execution and study of the regulations whose character will be viable and consistent (Geneva Serrabou, 2015, p. 6). Therefore, this fair and transparent regulatory system will actively encourage citizen participation and strengthen its permanence over time, seeking more significant benefits for society with the lowest possible costs.

Following, in April 2000, reforms to the Federal Administrative Procedure Law (LFPA) were approved, where the results demonstrate the transparency, progressiveness, and efficient development of the Mexican government. In

these reforms, two institutions were created that allow the consolidation of the regulatory improvement system. On the one hand, there is the Federal Commission for Regulatory Improvement (COFEMER), in charge of reviewing draft regulatory provisions and preparing regulations. As a second, the Council for Federal Regulatory Improvement, this is a consultation body that seeks to follow up on the implementation of regulatory improvement within the federation (Geneva Serrabou, 2015, pp. 8-10). Together they focus on ensuring the feasibility of public policies and seek to complement each other in order to improve government management in favour of the rights of the Mexican citizens.

Regulatory improvements have been implemented from the 1990s to the present day in different sectors: public, social and private, and have brought with them various benefits such as economic growth and development, both at the federal level and in the member states, and with the which, social welfare is guaranteed. Exemplifying, in the commercial sector, the regulations allow to build routes for innovation, such as the creation of companies, products, services; in turn, it is agreed to maintain a link with the principle of competition between the competitive balance of market players and high-quality regulatory standards. On the other hand, immersed in public administration, this policy creates opportunities to restructure energy, water, telecommunications, transport, among others (OECD, 2012, p.22). In other words, after improving economic and financial results, regulatory improvement has also met goals such as optimizing the quality of life, social participation, and democracy. In summary, this project that began with the aim of facilitating the lives of Mexicans, today, is a reflection of the effort to progress as a country and ensure with a valid government, security and compliance with the rights of its habitants.

To continue, Colombia is a South American country that has had a series of transformations in its form of organization of political power. Since 1991, as mentioned in the first article of its Constitution, Colombia is a unitary and decentralized republic that is organized in thirty-two departments and district

capital, Bogotá D.C. Its system of separation of powers is made up of the organs: executive, legislative and judicial; exercised by the Republican President who assumes the post of Head of State, government and the highest authority of the Public Administration; the congress that is made up of: the House of Representatives and the Senate; the Constitutional Court, the Supreme Court of Justice, the Council of State, the Superior Council of the Judiciary, the Attorney General's Office, and the courts, civil and military judges respectively. Colombia has a form of citizen representation based on political parties, which are characterized by the elitism and dualism of its two traditional parties: the Liberal Party and the Conservative Party, where the participation of citizens is demonstrated (Sanín Gutiérrez, 2002).

Colombia had several antecedents in terms of administrative simplification, the same that is a step towards achieving a policy of regulatory improvement. In 2014, the document CONPES 3816 laid the foundations for regulatory improvement in Colombia. This legal provision talks about the analysis of the impact of regulatory improvement. It indicates that the process will be carried out through five strategies: the implementation of the impact analysis, public and transparency consultation, institutionality, capacity building and inventory management. In this way, the AIN, or regulatory impact analysis, comes into effect in 2018 and becomes mandatory.

One of the main problems that Colombia had that made regulatory policy impossible to apply was the lack of knowledge about the tools for the application and implementation of the regulatory improvement. To solve the problem, they gave training, workshops, courses, guides, so that the administrators have the necessary knowledge in each area. In order to solve these conflicts, the AIN began to be applied in six entities as a pilot to see how it worked, analyzing in each one, what was the problem, the objectives, alternatives or proposed solutions, CBA, public consultations and the conclusions respective in the areas and entities (National Planning Department, 2017). Colombia's persistence to combat these obstacles led them to

seek these types of solutions that today have guaranteed their position as a member of the OECD. The key is to have the initiative to change and make it a reality.

A similar thing happened with the public consultation mechanisms that were not efficient because it took approximately seven days according to calculations by the National Planning Department. The solutions to this problem were the establishment of various public consultation mechanisms, the same ones that were applied through Decree 270 of 2017. In this norm, the time of publication, the response, the promotion of the participation of citizens and the annual regulatory agenda were compared and analyzed with the previous ones. Another solution was the SUCOP (Unique Public Consultation System), which will have the purpose of cooperation, planning, coordination, rationalization, communication and the traceability of the process. This project began in December 2016, aimed at four types of users: citizens, regulatory entities, supervisory entities and the portal administrator. The process of preparing the standards for public consultation consists of five stages, which are divided into Preparation, coordination, consultation, adjustments and final (National Planning Department, 2017). In this way, greater control was given to the way of applying the public consultation, and its streamlining was allowed.

Continuing, another difficulty that Colombia faced in pursuing proper regulation was that there was no inventory of the standards in an understandable way, there was no organization, nor due control or monitoring. This problem was since the population, and even public officials had a piece of imperfect knowledge and confidence regarding the administrative regulations that were in force. The solution that was implemented against this problem was the DUR (Single Regulatory Decrees), which consolidated the regulatory provisions into a single body containing the current regulations. In this way, it contributed to a better knowledge of the applicable legislation and gave higher speed to officials and citizens. Additionally, there was the formation of clear rules for the use, issuance and publication of administrative acts. Another solution was the creation of a

tool that measures the cost of the regulation, this to have an estimate of what the monetary values would be to assume, and to be able to generate recommendations about the associated costs. (National Planning Department, 2017)

Delving further into the complicated situation in Colombia, the government administration did not have joint competencies but were widely dispersed. For this reason, the establishment of an entity to supervise quality, promote regulatory improvement, and implement best practice mechanisms was proposed. Thus, dispersed competencies became a work of coordination between all levels of government. This project was born with an intersectoral commission for regulatory quality, and currently, it is maintained through decree 1052 of 2014. Consequently, the improvement of smart regulation developed, because Colombia did not only stay with the bases, as it was persevering and planned objectives to meet until 2018, such as extending this policy nationwide, implementing more tools for this improvement, generating more interaction between the various market sectors, generating more entities that issue and regulate the regulation. However, to what extent did it achieves this development on its own? Both COFEMER, OECD, OIRA-EE. The US, Regulatory Delivery, cooperated with various efforts to promote the administration and regulatory inventory that was in the process of being created in Colombia; always maintaining the objective of improving public policies in the country, so that they are prosperous and efficient (National Planning Department, 2017).

This whole process could not have been achieved without applying the principles of improvement and the cycle of regulatory governance. The principles were established to guide in some way the executive function and other levels of government towards better administration, these are: effectiveness, efficiency, necessity, legal certainty, transparency and public consultation, suitability, proportionality, simplicity, accessibility and responsibility. On the other hand, the governance cycle was created to materialize them and make them known according to the stages in which they are developed, the participating actors, the tools used, and the entities that

intervene in the different processes. The regulatory governance cycle revolves around six stages, which are: the regulatory agenda in the planning stage, the regulatory impact analysis (AIR) in the design stage, public consultation in the participation stage, previous concepts in the quality review stage, the official journal in the publication stage, and finally the ex-post evaluation in the evaluation stage (Committee for Normative Improvement - Council for Institutional Management and Performance, 2019).

II. ECUADOR: AN APPROACH TO THE CURRENT PROBLEMS AND THE POSSIBILITY OF ADMINISTRATIVE MODERNIZATION

Ecuador is a country located in Latin America with land border territory with Peru, and Colombia. It is within third world countries and is organized in the form of a presidential republic. The organization of power is decentralized into five functions: Executive, Legislative, Judicial, Transparency and Social Control, and Electoral. Within the fundamental principles, the Ecuadorian government is defined as social, democratic, sovereign, independent, unitary, intercultural, plurinational and secular (CRE, 2008, Art.1). As previously mentioned, Mexico and Colombia are social and Latin American countries that have managed to develop public policies aimed at improving their regulations, and Ecuador could do so.

Ecuador, as a secular state, is oriented to a significant intervention of the State in the social and economic fields. This philosophy of government predominates in the construction of states on the Latin American continent, the most unequal in the world due to its different conditions. Then, a criticism by Osorio (2018) is appreciated, who affirms that “21st-century socialism maintains the same classical principles of traditional Marxism, which limits the action of the market and attempts against private property” (para. 1)

However, socialism does not appear to be a problem as a whole. It is pertinent to emphasize that in the Mexican country socialism does not impede the implementation of regulatory

improvements. Fortunately, this brings the opportunity for Ecuador to follow these paradigms thanks to the similarities with Mexico and Colombia.

It is prevalent in socialism, the application of welfare policies supported under the opinion of John Rawls. However, these policies do not have a correct orientation for their application, so they cause a very indirect result to provide aid to the population. It is demonstrated by Corruption Perceptions Index 2019 which positions Ecuador in the 38th place, with 100 being the least corrupt index. In this way, it can be understood that there is a significant misuse of resources and poor coordination of assistance services for Ecuadorians. Unfortunately, the aforementioned ends up hindering the system instead of collaborating for efficient and agile development.

In short, the wealth of social and economic problems in Latin America and Ecuador do not allow the development of the Welfare State, which undesirably ends in a set of complicated, confusing, corrupt, and non-linear procedures.

2.1 THE ECUADORIAN REGULATION WITHIN A CRISIS OF PRINCIPLES OF EFFICIENCY.

The “Covid-19” also known as “Coronavirus” is one of the most severe health crises worldwide. It has not only allowed the increase in mortality and infection rates but also establishes a strong instability in the economic, social and administrative sectors of each state. Contextualizing, in Ecuador, there are several problems derived from the pandemic, which are associated with the inefficiency of public policies adopted by the respective government bodies. Therefore, it is necessary to identify the circumstances in which the opportune use of the principles of regulatory quality has been avoided.

First of all, the principle of proportionality is considered, which is frequently used in the legal world, whether for regulation, sanctions, or restrictions. This principle guarantees the manifestation of power as necessary to avoid the excessive

use of resources and to determine that the regulatory agents only intervene when necessary. According to (Baiges et al., 2009), “the interventions must be appropriate and proportional to the problem or the existing risk” (p.39). Furthermore, this fact implies that there will be an optimal use of tools in order to maintain a clear objective with a quantified impact on the desired agents.

The problem in Ecuador concerning this principle is the excessive regulation that limits freedoms and, on the other hand, the lack of efficient regulation when there are situations that warrant it. Moreover, an example will be presented that demonstrates how, in certain situations, state intervention is not necessary since, if excessive regulation were started, the free and correct functioning of the market would be restricted, as the same as if the deregulation was implemented, it would cause a chain of negative impacts. Today, proportionality has been demonstrated at the national level in the classification of provinces according to the number of contagions in that territory. Consequently, the rules of estrangement for each province is according to the traffic light in Ecuador. This method shows that red identification means an area with a high rate of contagions, and the green light means a place where the virus has been controlled. With this practice, people’s freedoms who are at risk are limited to the maximum with measures rules such as curfew, while in the low risk of contagion areas, it is merely to regulate activities. Imagine, what would happen if the same regime of restrictions would be generalized nationally? Inevitably the economy would collapse, the inhabitants would demand proportional restrictions and the country would not cover with all the different needs of the whole territory. The key is to identify which sectors need more strict regulation and follow their life activities. As a solution within the scope of Covid-19 time safety measures, restrictions concerning the number of contagions appear to be the most appropriate handling. While estrangement measures are used globally, there are territories in which they are most necessary due to the collapse of health institutions. Developed countries are commonly better at managing the virus, while third-world countries are attacked by problems of mismanagement of funds and mismanagement of

cases during the pandemic. Also, it is necessary to ask: To what extent does the regulatory improvement allow the optimization of resources? The principle of efficiency is one that seeks the use of economic, political, and administrative instruments or mechanisms that distort as little as possible the objective of developing viable and pertinent regulatory standards. In other words, it is sought to rationalize the scarce resources of society in such a way that it is possible to satisfy the needs and claims of citizens.

Contextualizing, in Ecuador, this ability to achieve specific purposes with the minimum of human and material resources is deficient. Not only within the economic field and public spending has sought to apply this principle, but also in the public administration, materializing, streamlining the procedures necessary to access education, work, housing, credit, among others.

Last August 2018, the Procedure Efficiency Law that governs all Ecuadorians was proposed, approved and is based on preventing public institutions from requesting certificates such as copies of identity cards, academic titles, voting certificates, a document of criminal record, the more in order to access public procedures. However, even today, this regulation has not been put into practice because of the idea of requiring individuals the aforementioned legal provisions to carry out the procedures corresponding to the needs of a private, state, or of the same human being.

Applying the regulatory improvement and immersed in it the principle of efficiency, a solution to this problem lies in using the coercive power within this standard. Criminal punishment and a penalty fee of a value that exceeds the basic basket should be imposed on all the habitats, companies, or associations that request procedures that can be easily accessed through a government platform which could be created by specialized professionals, in systems and telecommunications. At this time, the following question must be asked: to what extent does the proposed regulation outweigh the benefits of the measure at its costs? Indeed, this policy will create a

reasonable balance between the advantage that the measure offers, and the purpose pursued. The new regulation will allow people to think carefully about whether they want to commit this infraction and, in turn, allow the participation of citizens to create trustworthy virtual spaces and that these are candidates to be taken into account and managed by the Ecuadorian state. Among other advantages, this project based on this adequate regulatory standard will promote the use of clean technologies and will be friendly to the environment.

Therefore, as indicated in the norm, it is pertinent, because it establishes a regulation following the principle of efficiency, accommodating the objective pursued to the limited resources of the public administration; and, therefore, it should be considered to be implemented in the future.

From this brief description, the principle of responsibility that must be assumed by the regulatory agents also appears. As is well known, the problems within society look for a responsible person to take charge when the inconveniences arise. However, what is desired under this principle contained by the regulation is to have competent entities that make deliberate decisions and support them under clear criteria that do not exempt the ignorant or corrupt decisions of the regulatory entities. In Ecuador, the legal responsibility for bad decisions has not materialized in the justice system, so the principle of responsibility has not been made present.

> Overseeing justice in our country has become a utopia, especially since the beginning of the new democratic era, starting in 1979. Of course, corruption has grown since that time, the Administration of Justice has fallen and this homeland of ours in the claws of a lion that, together with his henchmen, managed the destiny of the country, leaving it socially, politically and economically destroyed. (Giller, 2009)

For solving the lack of application of the principles of responsibility, the solution is a regulation with clear rules. As an example, the country's criminal record on public officials such

as embezzlement, bribery, concussion, and illicit enrichment should be considered. There should be a severe and clear reform to the Organic Integral Penal Code to guarantee that those who are irresponsible with their obligations while they are at the service of the people, take charge of their actions and facilitate the process of judgment. The objective of strengthening penalties will certainly not be the prevention of crimes, but rather a better regulation that can be applied by prosecutors.

On the other hand, in the case of the agents in charge of regulation, they must also be responsible for the possible effects of their decisions, since they are materialized in-laws applied to the entire society. In Ecuador, laws are approved by the national assembly and the President of the Republic, according to article 137 (CRE, 2008). However, the proposal to guarantee regulatory quality should focus on the creation of specialized institutions since it is not logical that when the regulatory body, in this case, the assembly makes a mistake, they are their judges. Based on this institutionalization, the principle of responsibility would be supported by specialists, who would considerably reduce the risks of administrative failures. As mentioned before, Mexico and Colombia have institutions such as the Federal Commission for Regulatory Improvement (COFEMER), SUCOP (Single System of Public Consultation), the Council for Federal Regulatory Improvement, in addition to laws that guarantee the optimization of resources and strategic planning in law formation.

In conjunction with the other principles mentioned, the coherence principle is included, which consists of maintaining internal and external coherence in rules. As for the internal part, it includes aspects such as previous memory, EIR, explanatory memorandum and articulated text; while external coherence refers to both formal and material conformity with the entirely legal system. Amplifying the explanatory statement, in Ecuador, it is found within the Constitution of the Republic in article 76, numeral seven literal l:

> l) The resolutions of the public powers must be motivated. There will be no motivation if the resolution does not state the legal norms or principles on which it is based and does not explain the relevance of its application to the factual background. Administrative acts, resolutions or rulings that are not duly motivated will be considered null. The responsible servers will be sanctioned. (CRE, 2008. Art.7)

Even though the requirement of the principle of motivation presented in-laws and the recitals of consideration in the country's regulations, it falls short for what should be its application. Along the same lines, Cejudo and Michel (2016) affirm that coherence in public policies is a situation that requires analysis, and it is not correct to understand it as something automatic or implicit. In this way, this principle is essential to solving widespread problems. (p.1)

As a solution for Ecuador, deregulation is a step that must be followed just as Mexico did in order to eliminate norms that generate antinomies in the system. Once regulated in the strictest sense, the control of standards will be more efficient thanks to the considerable reduction of legislation. Likewise, the current regulations due to the fact of being considerably reduced will be subject to more specialized control thanks to the bodies in charge. In short, this control guarantees that the legal system remains in unity and under the respective justification for each law.

Additionally, the principle of transparency also plays an essential role in making the regulations recognized by all interested and affected parties. For this to be effective, one of the mechanisms proposed is popular consultations, since, in this way, democratic participation is promoted towards the parties so that they know the phases of the processes to be developed. Often followed, it is substantial to inform and raise awareness of the duties and obligations of both citizens, the public sector, and other market agents. It is essential for this principle that the rules are clear, simple and understandable by all and that they

have guidelines for their entry into force (Baiges et al., 2009). In this way, regulations focused on the exercise of the rights and needs of society can be guaranteed.

In Ecuador, there have been several controversies regarding the principle of transparency. Even though there are laws on this issue or that it is inculcated in homes, it has been seen that, in this time of the pandemic countless numbers of problems have appeared our country, such as, several complaints or demands to public officials for the various outrages of illicit enrichment, surcharge, bribes, and others; that have not only been civil or administrative, several of them have reached criminal trials. Besides, it would be essential to mention that by not acting promptly to investigate the cases, those involved have left the country taking advantage of the pandemic situation. As a result, the problems continue hindering in the judicial system without a practical solution. Therefore, the country cannot develop policies that lead it to become a member of prestigious organizations, due to the lack of application of this principle. For this reason, it is considered essential to strengthen the entity that controls and supervises the capital and monetary movement of officials, called the State Comptroller General (Contraloria General del Estado).

Besides, there would be no doubt a reform of the Organic Integral Penal Code, which would establish severe sanctions when an official reiterates (in one or more occasions) the crimes mentioned. In this way, a change can be achieved little by little in the society in which one currently lives, where there are poverty, corruption and significant conflicts of interest. This reform, established an Ecuadorian political system based on transparency, will also fully satisfy the needs of this nation.

Another primary factor for regulation to be useful is the approach in which it is developed, for this reason, it must be oriented to the difficulties existing in the society to which it is implemented; therefore, the effects they bring can be minimized and solved. This principle indicates that a prior approach should be made based on the risks of the problem and focus on the most potential. It is also essential that, when creating

the norms or regulations to them, the loads they will have for the different sectors to which they will be applied are evaluated (Baiges et al., 2009). Thus, it is possible to foresee what may happen and change so that there is a better development of specific regulations.

This issue of Regulatory Improvement is a clear example of the non-application of the focus principle in Ecuador because a decree was simply made and the process was not followed up, in addition to omitting critical steps in the regulatory governance process such as constant monitoring and innovation. Therefore, it is clear that the government did not have a broader approach and vision of what it wanted to implement. It is the importance of always having clear objectives for today and the future known as the vision and mission of a policy, to know where it wants to go with the application of specific regulations created. For this reason, it is crucial to create an entity that reviews the regulatory proposals and verifies that they have a clear focus. Otherwise, they serve as a guide so that they indicate the appropriate process to be implemented, and thus, have better legislation. Referring to the Covid-19 pandemic in which the world is currently immersed, it can be seen how this principle undoubtedly acts, because governments must take into account what they must do in the nations so that there are no more infections or deaths. It is crucial that well-focused projects are put forward by the public administration to come out ahead of this pandemic. As an example, the change of traffic lights in the provinces or cantons could be mentioned because each sector must be analyzed very carefully to foresee the worst.

Alluding to the economic aspect, are there rules that regulate the behaviour of market agents? The guiding principle for companies and citizens is based on developing clear and applicable legal provisions that allow economic agents to obtain sufficient information during the pandemic period. Among these, it can be identified the data about the new market buying and selling methods during the health crisis, the methods by which the state ensures adequate protection of people's safety by using virtual platforms, and even the proper use of media. However, one of the most severe problems within Ecuador

is the lack of these public policies due to the appropriate dissemination of information, as well as the inefficient response of the state regarding control of the “free market” and scams within the networks.

One of the new challenges for the Ecuadorian government is the creation of sufficient information and communication technologies. Phishing, bribery, scam via mobile applications in supplies, suppliers, investments, and excess fraudulent sites are several of the problems that arise during the health emergency. In these times of considerable uncertainty, the “fraudsters” abuse the state of unpredictability created by the government bodies during the presence of “Covid-19”. Victims are generally contacted through the telephone network, email or social networks to make deposits or bank transactions to false accounts in exchange for non-existent products or services.

Then, the creation of a regulation that controls free competition in Ecuador within virtual platforms is proposed. It must contemplate that each natural or legal person who wishes to promote its ventures electronically must meet a series of requirements. Exemplifying, the institution or individual interested will need to present the necessary data to corroborate its legal existence, second, the certificate of guarantee of products or the service to be promoted will be presented, the webspace where the visualization of what is being offered will be validated and finally, a sales record will be included for all suppliers. This project will ensure that consumers buy with knowledge and wisdom about what the various institutions offer and are sure that these are produced under safe, viable, and transparent standards.

In conclusion, the principles mentioned above allow state authorities to create public policies based on efficiency, transparency, responsibility, coherence, orientation to citizens and companies, proportionality, and focus, in addition to those that countries wish to adopt. In this way, the generation of precise legal provisions, simplified procedures and services will be achieved, as well as active institutions aimed at obtaining benefits with the lowest possible costs.

Thus, it is clear how the ideas are expressed on written paper; however, their execution falls short. Nonetheless, the positive side of the legal base already explained allows us to be one step ahead since planning is set out in the decree mentioned above. Although currently the benefits of this decree have not been realized, hope remains for those who assume the command in the coming years.

The second step to take is to consolidate the principles of government according to the nation concerned, taking into account transparency and the participation of all those affected by politics to avoid a conflict of interest. It implies creating ways for the population to which it is applied to contribute to the regulatory process with proposals or analysis of these. It is relevant to mention that the governments that implement the policies must carry them out clearly so that the parties affected are aware of their obligations and rights.

If we apply this recommendation to Ecuador, the most important and central part of the process is transparency. Therefore, it would have to improve in the fight against corruption, so that as a country, a better policy can be implemented and adjusted to international standards. For this to happen, the recommendation on ending corruption and restoring confidence in Transparency International policy should be followed; where it is mentioned that to promote the integrity of the political system, it should be a management of conflicts of interest, control financial policy, strengthen electoral integrity, regulate the activities of the municipalities, agree on preferential treatment, empower citizens, and reinforce checks and balances (Transparency International, 2020). Following these steps, Ecuador could have less and fewer corruption rates and a more balanced economy.

On the other hand, when making or having a proposal on public policies, the principle of approach should be kept in mind so that these regulations have an orientation more attached to the reality in which society lives, to the economic situation, and to understand everyone who is affected by what their purpose is and what will be accomplished over time. Likewise, together

with this principle is that of coherence, since, in order to have clear and understandable rules, its presence is undoubted. Additionally, efficiency and agility in any process will always be paramount so that it has the expected reception and thus be able to develop more projects at the same time. Also, it is necessary to mention that responsibility, proportionality and orientation are fundamental axes in the creation, planning or reform of any project. By applying all these principles in the country's development policies, the positive change generated in society can be seen.

2.2 A DEVELOPING COUNTRY TOWARDS REGULATORY IMPROVEMENT

It is worth noting the importance of formal regulatory policies, that is, issued by the executive and promulgated by the legislature so that they are homogeneous for all levels of government, and not that these entities or instances create their initiatives or proposals regarding regulatory improvements. In this way, there will be a comprehensive regulation for everyone, and there will be no problems of inconsistencies between regulations. For the correct implementation of this policy, a highly transparent and decisive commitment is required to achieve the objectives that the OECD set out in the Council's recommendation on Policy and Regulatory Governance in 2012 to progress with them.

Furthermore, these policies must express clearly and concisely the procedures that each entity must follow to design the regulations in each field that is needed. The propitious thing so that the countries strengthen their capacities in diverse areas in quality and regulation is that they follow the recommendations of the Council on Regulatory Policy and Governance, an advisory body of the OECD. It was given in 2012. It highlights 12 steps to follow for both member countries and candidates as a piece of advice.

Regarding the first step, the total commitment by the government to have a good quality of regulation is part of the basis to start the process of change. The need to have a leader in

the face of all these reforms to guide the process is undoubtedly imperative since it drives constant change from the centre of government. Thus, the initiative must be backed by practical objectives to ensure that the benefits outweigh and justify the costs.

For the applicability in Ecuador, on May 4, 2018, decree 372 was promulgated aimed at declaring state policies about the regulatory improvement and simplification of procedures. Additionally, this decree was supplemented with the provisions of the National Development Plan 2017-2021. However, the issue of regulatory improvement is only mentioned three times throughout the document, which shows that it has not had a genuine interest in changing the countries administration problems (Moreno, 2017). Based on this decree, it is identified that the National Secretariat for Planning and Development outlines the stewardship and regulation in matters of regulatory policy, the creation of a Single National Registry of Procedures and Regulations is also required. It is stated that the creation of the Interinstitutional Committee Regulatory Policy and Simplification of Procedures will promote regulatory policy, as well as the elimination, reduction, optimization, simplification and administrative automation and procedures in the Central, Institutional Public Administration, and entities that depend on the Executive Function (DE- 372, 2018).

As a third step, the institutionalization of entities or mechanisms that supervise the regulatory improvement process must be part of reality. Decree 372 establishes the Inter-institutional Committee for Regulatory Policy and Simplification of Procedures. According to article 6, it is mentioned that:

> Create the Inter-institutional Committee for Regulatory Policy and Simplification of Procedures, as a collegiate body that will have the purpose of coordinating, promoting and cooperating in matters of regulatory policy, as well as in the elimination, reduction, optimization, simplification and administrative automation and procedures in the Central, Institutional

Public Administration, and entities that depend on the Executive Function, in addition to other public sector institutions or levels of government (DE-372, 2018).

Although this institution would have the initiative to act, there are obvious problems that must be combated. As the strongest corruption is identified, this negative aspect affects the rule of law and generates legal insecurity that causes a lack of confidence in the different forms of manifestation such as institutions, governments and law. In order to compete against this problem in Mexico, Pardo (2007) states that "by 2004, 161 federal government institutions had transparency and anti-corruption programs, more than 4,000 improvement actions were carried out in 378 processes in them" (p.8). In Ecuador, a favourable ground must be prepared for the implementation of regulatory improvement, and that step is to eliminate the minimum harmful and corrupt agents of the public administration.

In addition to the Inter-institutional Committee for Regulatory Policy and Simplification of Procedures, there is a need to have an organization in charge of reviewing public policies. Although the coordinating body already exists, it is always necessary within the process that there are entities in charge of control, resource management and also the supervision of incorrect actions. In Ecuador, that institution on oversight does not exist, and it would not be convenient for the same committee to be a judge and party to its actions. It would not be feasible to grant this power to the National Secretariat for Planning and Development since the system would be overloaded and it would not fulfil its functions.

A regulatory impact assessment also called an EIR, should be integrated into the fourth step. This evaluation should be carried out in the early stages when planning and formulating policies. Also, it is essential to consider the different requirements to which the regulation will be applied and to determine the best ones from the different approaches. The Ecuadorian state has within its constitutional body in Article 76 number 7 literal L, the principle of motivation in which it

is stated that the norms, established principles and facts on which a legal provision is founded must be incorporated in any resolution. It will ensure that each administrative act, project, policy contemplates a substantial objective that is adequately supported and expressly stated.

However, is this aspect sufficient for regulatory improvements to be implemented? The answer is negative because associated with this article. We find art. 136.- Requirements for the bills of the Constitution of the Republic of Ecuador and art. 56 of the Organic Code of the Legislative Function, where it is determined that the presentation of bills must belong to a single subject, will present an adequate explanation of reasons for the legislation and should be articulated. In none of these guidelines is the current trend that dominates the market, the Cost and Benefits Analysis "CBA" that has already been implemented by other countries such as Peru, Mexico, Colombia, Uruguay; and that it has presented improvements in its administrative processes by generating unique potential in developing countries, since this system adds quality, transparency and efficiency to regulations.

The first move that Ecuador should make to ensure that there is a pertinent regulatory evaluation is to propose an amendment to art. 136 of the Constitution, which mentions the requirements of the bill. In this, the CBA method will be incorporated, and it will be established that both the approvals of general laws and the resolutions that have been proposed in the legislative sector prepare a meticulous study of the opportunities and consequences of their validity together with the due explanation of reasons. The purpose of this solution is to avoid any type of future problems that affect the administration and regulation of state institutions and the lives of Ecuadorians.

These mentioned points are closely related to the fifth step in which systematic reviews of the inventory should be carried out based on the proposed goals, taking into account a cost-benefit analysis in order to meet the objectives set when designing the policies. The proposed amendment will allow the methodology of the "Cost-Benefit Analysis" to evaluate the

advantages and impacts of the bills and, in this way, provide the legislators with the necessary tools so that they can debate with more information the future laws, resolutions, administrative acts and public policies, to be approved or repealed.

Furthermore, the new legal provisions of Ecuador will always have a legal basis, be under the principle of motivation, have arguments that support and justify legislating on a particular matter, and the objectives to be achieved. This new system will demonstrate the existence of the obligation of citizens to carry out a cost-benefit analysis with the four critical stages.

The sixth step is to periodically publish reports on the performance of policies, programs, and enforcement authorities. It would be appropriate to indicate in the report to the nation, the same that is presented by the President of the Republic under article one hundred forty-seven number seven of the Constitution. It should be emphasized that first, a report will be presented by the entities and authorities in charge of each area to the President, and later this through the report on compliance with the guidelines proposed at the beginning of his presidency, and then those he has for the next year.

Developing formal, clear and specific policies with detailed functions to give confidence to the parties about the decisions made, is the seventh step. Consistent and impartial criteria must be taken into account, without conflict of interest or other undue influences on the processes for ensuring the best policy application. Besides, applying the previously mentioned principles and evaluations of regulatory impact analysis and cost-benefit. As a consequence of this application, it will be seen that citizens strengthen the bond of trust with politics and the system.

Following the eighth step, the inspection of the legality and justice of the processes and decisions made by the entities that have the jurisdiction for the issuance of regulatory sanctions occurs. Additionally, it is ensured that those to whom the policy is directed have access at a moderate cost and have

the necessary knowledge about the policies and projects to be implemented. These process inspections should be carried out by the authorities in charge of each entity in different areas. Moreover, later the inspections on the decisions of the authorities should be analyzed by the President of the Republic. In this way, all the people in charge of the process and decisions are analyzed to have better benefits and decisions, and thus the citizenry will be satisfied knowing that both the processes and the people in charge must have reviews, and consequently, conflicts will be avoided.

Within the ninth step, the elements mentioned previously in the fourth and fifth aspects are reiterated; where management evaluations and strategies in the implementation of regulatory policies must be continuously carried out in order to ensure that these policies are correctly orientated and accomplished. It will be done with the new and due Cost-Benefit Analysis system.

Upon reaching the tenth step, it aims the coordination between the supranational, national and sub-national levels, since in this way there will be regulatory coherence for the entire territory and conflicts will be evaded. This step is applicable for the previously explained institutions: the first as a coordinating body and the second as a supervisory body. Coordination between institutions is essential to avoid contradictions and keep their functions adequately established.

In order to propose this coordination between institutions, the respective functions of both will be considered. In the case of the Inter-institutional Committee for Regulatory Policy and Simplification of Procedures, it has eight functions, among which are promoting plans, projects, programs, inter-institutional methodologies for regulatory improvement and administrative simplification and procedures; approval of the National Regulatory Policy Plan and the National Simplification of Procedures Plan; evaluation and monitoring of compliance with the National Regulatory Policy Plan and the National Simplification of Procedures Plan; the coordination with the entities of the Executive Function, the systematic and permanent

survey of the administrative procedures and procedures to identify those that require deletion and simplification, as well as their updating, coordination with the other functions of the State and levels of government, the alignment of its regulations and procedures with the objectives of regulatory policy, administrative and procedural simplification, and the application of policies, methodologies and tools developed for this purpose; coordination with the private sector and academia; the identification of unnecessary procedures in its relationship with users, as well as the progressive simplification and digitization of its services; and, the other attributions that are assigned by the President of the Republic. (DE-372, 2018).

On the other hand, in the case of the inspection institution, it is also convenient to establish its functions. It would be considered appropriate for this institution to have similar functions as the General State Comptroller's Office, but they will only be in charge of the committee. Among the main ones is directing the administrative control system for regulatory improvement, which is made up of internal and external auditing, and internal control of public sector entities that have the resources to streamline procedures. As a second, but not less important, the function is to determine criminal administrative and civil responsibilities as well as indications of criminal responsibility, related to the aspects and actions subject to its control, without prejudice to the functions that in this matter are proper to the Attorney General State (Fiscalía General del Estado).

The eleventh step is about promoting the performance of regulatory policy management at different levels of government. As a pilot plan, the option of initiating regulatory improvement processes is proposed in the cities with the most significant administrative burden, such as Quito, Cuenca and Guayaquil.

Finally, the twelfth step is concentrated on developing timely regulatory measures in which it must be taken into account and cooperate within international regulatory standards; the purpose of this process is to ensure a proper

application of the regulatory reform in each administrative area. For this, countries like Ecuador that seek to undertake the process of regulatory improvement require the support and monitoring of strategies proposed by the OECD.

It is essential that the Ecuadorian government develop the document "Skills of the OECD" (OECD, 2012, pp. 49 - 50) in which the strengths and weaknesses within the public administration and management of Ecuadorian state policies are analyzed. In this way, it will be possible to recognize if there is the possibility of activating competences within the market or if it is appropriate to create spaces for intellectual exchange in which ideas can be translated into regulatory improvements so that these, in turn, achieve the objective of consenting to the adequate living conditions for people, the simplification of administrative procedures, and the reduction of unnecessary costs in other government acts or actions that do not favour effective progressivity in the administration of Ecuador.

Analyzing the background of this method, it is worth exemplifying the case of Mexico, a member country of the OECD, which used this regulatory system to pose challenges within social, economic and administrative areas, and which should be an example for Ecuador (OECD, 2012, p. 52). It has been proposed to improve the level of capabilities of compulsory education students in order to increase access to quality higher education and that their citizens have the same employment opportunities as others and, above all, are fully informed about the actions taken by the Mexican authorities, the context of their country, and the ways to improve specific guidelines in the public administration and within the social sphere.

As a second aspect, they have considered the possibility of eliminating the existing obstacles between the scopes of supply and demand, since they wish to promote the activation of the formal market. At the same time, the aim is to reduce informality rates every day, thus promoting the effective enjoyment of human rights, such as decent work. Finally, alluding to administrative management, the mission of ensuring collaboration between the Government and other interested

parties to achieve better financing from the public and private sectors for the elaboration of projects or public policies is presented.

Continuing, Ecuador can not only apply the method used by Mexico but also, if it decides to be part of the OECD, it will have the possibility to sign agreements or conventions within its sphere of competence and importance, with specific international organizations and other countries around the world that they provide support and are relevant. For example, Canada signed the Trade, Investment and Labor Mobility Agreement (TILMA) or the Internal Trade Agreement (ICA) that favours entrepreneurial ventures and international business. Just like Mexico in the State of Baja California, sign the Business Service Center (CAE) to improve the balance between supply and demand, or be part of COFEMER to streamline the procedures and services provided by the state government (García Villareal, 2010, pp. 35-36). As has been made visible, there are several standards that the Republic of Ecuador could adopt to achieve an effective regulatory policy.

In summary, the formulation of regulatory policies carried out by each of the countries around the world and members of the OECD must follow a series of steps in order to achieve a suitable application and execution. These range from evaluating the political system of nations, through the analysis of governance methods, to the suppression, merger and modification of individual administrative acts or projects will guarantee clear, public, and transparent regulations for its citizens.

III. VIABLE PUBLIC POLICIES, THE NEW CHALLENGE FOR ECUADOR

At the same time that the principles already explained and the process framed in the twelve steps must be applied, it is convenient to add more recommendations. Blaiges, Gibert, Pellisé de Urquiza and Tornabell (2009), highlight different ways to simplify processes that can be applied together (p.36-

37). Then they will be expanded, taking into account the strategic planning of development tactics for Ecuador.

A correct regulatory improvement application in Ecuador requires a series of guidelines. It is necessary to eliminate regulations that are not indispensable or essential in society, then, the reduction of the burden of legal provisions that impede the correct development of market agents within day-to-day processes must be investigated. Finally, as a new alternative, it is crucial to examine public policies to merge them and learn the extent that they can reach together.

For this, it is necessary to carry out an express study of the administrative acts or projects created in which the number of beneficial rules can be separated in terms of those that are deficient and little applicable. As an example, referring to the margin of manoeuvre of the Superintendency of Banks in Ecuador, this should include the risk rating agencies that, according to the regulations, must follow a rotation every three years, which instead of promoting professionalism and dynamics in the finance sector has produced a market stagnation. The reason is that despite the advantages they bring, their negative externalities are higher. The rotational change of these has prevented the adequate information to be provided to foreign investors about the stock market, credits, shares, among others, of Ecuadorian entrepreneurs. Therefore, most of the qualifiers due to ignorance have brought with them several disadvantages for the economic development of the country. Given this circumstance and with the help of regulatory improvement, the term of the three-year rating agencies should be eliminated, or, in turn, this regulation should be merged with the laws that control companies. In short, as evidenced after carrying out an exhaustive study of regulatory policies, the suppression of them should be promoted, their content should be modified, or, at the same time, joining with others at the same area of competence should be allowed.

In the simplification of processes to comply with the regulations, forms, requests or inspections of information that is not essential should be eliminated, the time to complete the

forms and the frequency of requests for different procedures should be reduced, among others. The correct application in the country should be guided by Executive Decree 372 and previously mentioned recommendations, just as other OECD member countries have done. As it is known, in the country there is an excess of obstacles in which for a person to be able to carry out the due process or administrative processes, several requirements are required, or a significant amount of time needs to be used to carry them out. With this in mind, if these procedures are made feasible with the implementation of new methods to minimize time, people would be more satisfied to have their documents, requests and other procedures faster. It not only helps people who require a service but also favours each entity, company and other institutions so that they have a better internal and more agile organization.

Another critical point is the ability to share information with market agents on the new regulatory policies. Consequently, the Ecuadorian government management must provide the most appropriate methods so that the principle of publicity found in article thirteen of the Civil Code fully complies. If everyone is duly attentive to the new regulations, each citizen will be aware of how the public sector will undertake new procedures, projects, and may even propose new means of creating regulations. One of the advantages of insightful communication and instruction is that confusion over administrative acts, public administration processes, or policies that govern people's lives is avoided.

Additionally, communication and information technologies are an undoubted advance to streamline processes and considerably reduce administrative costs for both users and public officials. In the context of Ecuador, technological connections do not seem to have such speed and coverage, as explained by the Global Connectivity Index (2019) where it is verified that Ecuador is the number sixty-seventy-nine country, with a score of thirty-seven out of one hundred twenty compared to the connectivity of other countries. Ecuador undesirably falls below the world average due to its difficult geological formation filled with mountains and valleys. It is well

known that this third world country, which is in its first stages of development, both technological and commercial, has the opportunity to improve as long as the implementation of ICTs is presented as a future objective of governments.

However, it is necessary to propose real solutions within this field in which Ecuador is located; and use the tools that exist in that territory. As a more substantial example, web pages are presented that are equipped with a user-friendly and understandable system that has a clear division of procedures and allows communication with those in charge to solve problems. The pages must have a section on online consultations, related procedures, information download and a communication chat. As another alternative, the creation of applications for smartphones is presented, which have many functions to carry out processes, upload documents, request information, among others. These two options are already used in Ecuador for different services, so at present, the challenge is based on disseminating and perfecting their usage.

Both the applications and the other measures need to be explained correctly to promote their use and prevent people from going to places to request information. Television is a valuable resource and the simplest that can be used by the Ecuadorian population. Therefore, the news channels carried out at the national level should undoubtedly be in charge of explaining how the innovations in-process work. Additionally, it is essential to emphasize that adolescents have a different market segment than the rest of the population, so information through social networks is presented as an efficient form of communication for those who are just beginning their lives in legal procedures.

However, the advantages of technology are proven worldwide, designing electronic forms, using electronic processing or offering global service portals to companies on the Internet are opportunities that frame the speed of processes thanks to ICTs. Since the Covid-19 crisis, the internet and platforms like Zoom, and Microsoft Teams have become the tools of work and study worldwide. Countries that have

functional connectivity from online platforms have had healthy development in their day-to-day activities as well as in the administrative procedures. However, countries such as Ecuador, who have been forced to use platforms to make online payments among other procedures, unfortunately, it has not always gone as expected as the country was not prepared for this online service improvement. The social impact of these innovations materializes in the dissemination of culture, in enhancing social participation, and in emphasizing disadvantaged communities (Pérez and Sarrate, 2011, p.2). Along the same lines, it is still affirmed that ICTs collaborate with the transfer of knowledge, precisely this function is critical for regulatory improvement since the dissemination of information allows the community to participate efficiently and fully streamline procedures.

When talking about improving the information they provide to the members' community, they should make guidelines more transparent, more productive, and accessible to citizens, companies, and others. If it is necessary to rewrite the existing guides to make them simpler and make them available to citizens through platforms, the risk must be taken by the government. Besides, giving the data on time, because many occasions, the information obtained by the public administration is belated. As an example, it can see what is happening with the pandemic and the rate of infections and deaths. The information that the citizens receive is not timely from the government. The first to provide information is the media, which by the way is not known whether the information is accurate, but since they do not have access to valid data from the public administration, citizens trust in the one provided by different media. It leads to residents losing confidence since other institutions or media give them the same information in advance and effectively.

CONCLUSIONS

From this brief review, regulation is understood as a set of norms that are oriented to the various social, administrative and economic activities of the society. In order to achieve an adequate implementation of regulatory policies, the OECD emerged as a leading institution in the improvement of administrative systems to guide globally the nations interested in improving the quality of life of their citizens. As it has been mentioned throughout this work, the benefits of this regulatory improvement lie mainly in two aspects, the simplification of administrative procedures, and the streamlining of these while reducing all kinds of costs. Along this same line, Colombia and Mexico have been two Latin American countries that have managed to form part of this regulatory improvement application and therefore have provided a holistic vision for Ecuador to follow in its steps.

However, it has been shown that the path to implement regulatory improvement and become part of the OECD is demanding since it imposes the use of different principles, the institutionalization of companies specialized in the subject, and also the creation of strategic planning departments. It is essential to mention that for the Latin American countries to reach this prestigious organization, it has been a difficult challenge, but not an impossible one, which certainly leaves Ecuador the possibility for the future. Nowadays, this challenge continues growing due to the global health crisis, Covid-19. This serious health problem has shown that those with proper management of funds and resources are the same ones that have coped with the contagion population. Unfortunately, those in the course of development have lamented severe consequences such as a high death rate. It is because the OECD recognizes the administrative shortcomings of the Latin American continent, so there is a full degree of cooperation to promote the initiative for regulatory improvement, which is undoubtedly a point in favour for Ecuador.

As demonstrated, a crucial part of the work is based on two countries that have achieved regulatory improvement and also active members of the OECD, Mexico and Colombia. Despite the difficulties at the government level and the long history of bad regulatory decisions in the countries as mentioned above and also in Ecuador, a series of principles are presented together with their possible application, for avoiding or repairing their lack or excessive implementation. In practice with this objective, the real problems and solutions for Ecuador have been raised in parallel in order to fight against the crisis of regulatory principles such as responsibility, coherence, proportionality, efficiency, and transparency among those already mentioned. Under the Colombian and Mexican paradigms, and the guidance of the guiding axes of the OECD, Ecuador will undoubtedly be able to be one of the winners in the regulatory improvement and become a member of the OECD in the future.

Thus, after this thoughtful analysis of the regulatory improvement for its application in Ecuador, the option is outlined so that the Ecuadorian terrain opens up to the opportunity to be efficient in administrative procedures. The opportunity continues in Ecuador thanks to the government of Lenin Moreno, that during the period from 2017 to 2021 promoted the initiative for regulatory improvement, in its first steps. The key to success lies in putting into practice the strategic planning already demonstrated in Lenin's decree; also in institutionalizing the proposal through the Inter-institutional Committee for Regulatory Policy and Simplification of Procedures; and finally in the creation of an entity in charge of the inspection in case of errors. As a complement, Ecuador must promote innovation to aspire to reach the major leagues in which the countries are part of the OECD.

In short, different organizations continue to search for the minimum use of human and material resources, in order not only to leave the idea on paper, but also for Ecuador to carry out the initiative with visible results. This Latin American developing country has the support of the most notorious examples and paradigms explained, Colombia and Mexico.

Finally, regulatory quality broadly defines the functioning of society, so the existence of clear, public, and precise rules that are in line with reality is essential. Although it has been explained that Ecuador has a deficient crisis in its principles, it still has the challenge of training its citizens in a culture of regulatory education to positively activate the economy, public administration and lowering the system's transaction costs.

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Free Trade Agreement with the European Union and food sovereignty in Ecuador: A review from the Economic Analysis of Law

Tratado de Libre Comercio con la Unión Europea y soberanía alimentaria en Ecuador: Una mirada desde el Análisis Económico del Derecho

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ABSTRACT: This research article analyzes the current situation of food sovereignty in Ecuador linked with the Free Trade Agreement between Ecuador, Peru Colombia and the European Union (FTA), after almost four years of its entry into force, considering the impacts of the sanitary and economic crisis generated by the coronavirus pandemic in Ecuador, which has produced significant consequences for small food producers, specially in terms of poverty and inequality. In addition, this article aims to present a review of the implications that the Free Trade Agreement has had on the food sovereignty regime in Ecuador, from the economic analysis of law, analyzing whether this international instrument reduces transaction costs and is efficient in terms of food sovereignty, or whether an inalienability rule should be applied to counteract the externalities it generates in sustainable food production aligned with food sovereignty[1].

KEYWORDS: international treaty, trade, right to food, market economy, agriculture.

RESUMEN: Este artículo analiza la situación actual de la soberanía alimentaria en Ecuador relacionada con el Tratado de Libre Comercio entre Ecuador, Perú Colombia y la Unión

1 This article is part of an independent research project whose main result will be a book focused on the analysis of Food Sovereignty in Ecuador.

Europea (TLC), después de casi cuatro años de su entrada en vigor, considerando los impactos de la crisis sanitaria y económica generada por la pandemia del coronavirus en el Ecuador, misma que ha desencadenado consecuencias importantes para los pequeños productores de alimentos, especialmente en términos de pobreza y desigualdad. Además, este artículo pretende realizar una revisión de las implicaciones que el TLC ha tenido en el régimen de soberanía alimentaria en Ecuador, a partir del análisis económico del derecho, analizando si este instrumento internacional reduce costos de transacción y resulta eficiente en términos de soberanía alimentaria, o si se debería aplicar una regla de inalienabilidad para contrarrestar las externalidades que genera en la producción sostenible de alimentos alineada con la soberanía alimentaria.

PALABRAS CLAVE: tratado internacional, comercio, derecho a la alimentación, economía del mercado, agricultura.

INTRODUCTION

Ecuador ratified the FTA with the European Union in December 2016, and its biding effects started since January 2017. Since then, almost four years have passed, and Ecuador is currently dealing with one of the worst social, economic and sanitary crises, mainly generated by COVID-19 pandemic and the massive plunge in oil prices. In this context, it is necessary to reevaluate the situation of food sovereignty in Ecuador and the economic and commercial effects of the FTA with the European Union with an economic analysis of law perspective. Considering the vital importance that a sustainable food production system will have in the following years, not only to avoid hunger in ascendant poverty and unemployment landscape but also to strengthen the countryside and the local production as a source of sustainable development.

Consequently, the present article evaluates the situation of food sovereignty in Ecuador as an ongoing project which implementation has faced massive delays, and until today is not a reality. Then, it explains the relationship between

food sovereignty and the most relevant FTA's biding provisions regarding agriculture and sustainable development, to finally expose a brief analysis, from the economic analysis of law, of some implications that the FTA presents about the Ecuadorian food sovereignty regime.

1. FOOD SOVEREIGNTY: AN INCOMPLETE PROMISE IN ECUADOR

The COVID-19 economic and sanitary crisis has shown that the world's food system is extremely fragile and that the traditional discourse of "food security" is not enough to undertake the pressing worldwide hunger and poverty problems. Additionally, the pandemic has proven that the agro-industrial production methods, controlled by a small group of international corporations, is failing. Nowadays, more than ever, we are conscious of the importance of the countryside and local production, because we can live without cars, planes or clothes, but yes, we cannot live without food.

According to the "2020 Global Report on Food Crises", in 2019, 135 million people were suffering from acute hunger. This number "increased by 22 million between 2018 and 2019, as a result of worsening acute food insecurity conditions" (World Food Programme, 2020, p. 20), and "the COVID-19 pandemic could now double that number, putting an additional 130 million people at risk of suffering acute hunger by the end of 2020" (United Nations, 2020).

In Latin America, the situation is similar. Because of the pandemic, the population in conditions of extreme poverty could reach 83.4 million people in 2020, which would imply a significant rise in the levels of hunger (ECLAC, 2020). For this reason, the implementation of adequate food policy in Ecuador, oriented towards food sovereignty, should be a priority for the government.

In general terms, the concept of food sovereignty was developed by a transnational social movement, mainly integrated by producers, called "Vía Campesina" in 1996

(Bellinger & Fakhri, 2013). The main objective was to create a new collaborative and sustainable food production system. Also, reflecting other relevant dimensions not considered by the traditional concept of "food security", understand as the situation in which "all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life. In this regard, concerted action at all levels is required" (FAO, 1996). In this way, during the Nyéléni Forum of 2007, the "food sovereignty" was defined as:

> (...) the right of peoples to healthy and culturally appropriate food produced through ecologically sound and sustainable methods, and their right to define their food and agriculture systems. It puts the aspirations and needs of those who produce, distribute and consume food at the heart of food systems and policies rather than the demands of markets and corporations. It defends the interests and inclusion of the next generation. It offers a strategy to resist and dismantle the current corporate trade and food regime, and directions for food, farming, pastoral and fisheries systems determined by local producers and users. Food sovereignty prioritizes local and national economies and markets and empowers peasant and family farmer-driven agriculture, artisanal - fishing, pastoralist-led grazing, and food production, distribution and consumption based on environmental, social and economic sustainability. Food sovereignty promotes transparent trade that guarantees just incomes to all peoples as well as the rights of consumers to control their food and nutrition. It ensures that the rights to use and manage lands, territories, waters, seeds, livestock and biodiversity are in the hands of those of us who produce food. Food sovereignty implies new social relations free of oppression and inequality between men and women, peoples, racial groups, social and economic classes and generations. (Declaration of Nyéléni, 2007)

It is important to mention that the fight for food sovereignty has a significant impact on the conception of peasant's rights and food policy worldwide. Thus, at the end of 2018, the UN General Assembly adopted the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas. It recognizes food sovereignty as a right[2], for the first time (United Nations, 2018). While this international instrument does not generate binding effects, it is an important precedent for the development of food sovereignty at the international level. (Paredes, 2019)

Now, regarding Ecuador, in 2008, the Article 281 of the Ecuadorian Constitution included "food sovereignty" as a strategic objective and a State obligation to ensure that individuals and communities achieve self-sufficiency of healthy and culturally appropriate food permanently (CRE, 2008). Although it was not directly stated as a "right", the Constitution considers specific responsibilities that the State should follow to fulfil the food sovereignty objectives. For instance, adopt fiscal and tariff policies to protect the national agri-food sector (CRE, 2008, Art. 281.2), and promote the food system transformation. (CRE, 2008, Art. 281.1)

Additionally, the food sovereignty principles were included in the National Development Plan 2017-2021, which contains the foundations for the State's public policy framework. As part of this plan, objective number 6 for the national development, refers to "develop productive and environmental capacities to achieve food sovereignty and rural Good Living" (SENPLADES, 2017). Furthermore, the Ecuadorian Legislative Body enacted the Food Sovereignty Law in 2009.

Nevertheless, more than ten years have passed, and the food sovereignty regime is still an inconclusive promise. Mainly because of the reduced budget of the Plurinational

2 The Article 15.4 states: "Peasants and other people working in rural areas have the right to determine their food and agriculture systems, recognized by many States and regions as the right to food sovereignty. It includes the right to participate in decision-making processes on food and agriculture policy and the right to healthy and adequate food produced through ecologically sound and sustainable methods that respect their cultures" (United Nations, 2020)

and Intercultural Conference on Food Sovereignty (COPISA); the only institution responsible of the formulation of food sovereignty policies, and, the inexistent secondary regulation that could turn applicable the dispositions contained in the Food Sovereignty Law. Ecuador has not advanced in the adoption of a new model of food production; contrary, it has deepened the traditional agro-industrial practices. (Paredes, 2019)

2. THE FREE TRADE AGREEMENT WITH THE EUROPEAN UNION AND FOOD SOVEREIGNTY

The Free Trade Agreement between Ecuador, Colombia Peru and the European Union (FTA) entered into force in 2017. This international instrument aims to "establish a free trade area, in conformity with Article XXIV of the General Agreement on Tariffs and Trade of 1994 (...) and Article V of the General Agreement on Trade in Services" (FTA, 2016, Art. 3) and includes: (i) the Protocol of Accession to the Trade Agreement between the European Union and its member states, on the one hand, and Colombia and Peru, on the other, to consider Ecuador's accession; (ii) the annexes to this Protocol; and, (iii) the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part. (Opinion No. 009-16-DTI-CC, 2016, p.24; Paredes, 2019)

It is essential to mention that all the provisions of the FTA are binding for the country as provided for in Article 8 of this international instrument. Also, the State shall take "any necessary measure to implement the obligations under it, including its observance by central, regional or local governments and authorities" (FTA, 2016, Art. 8.1). Otherwise, the State would breach the Agreement and should submit to the Dispute Settlement Mechanism set out in Title XII of the FTA.

The FTA includes some provisions about human rights and agriculture, which are strictly related to food sovereignty regime in Ecuador. The Article 1 states that the principles of human rights and democratic development are the basis of the Agreement, while the Article 4.a states that one of the

objectives of the instrument is to create a "progressive and gradual liberalization of trade in goods, in conformity with Article XXIV of the GATT 1994". Besides, Article 5 of FTA establishes that the Parties reaffirm the rights and obligations acquired under the WTO Agreement, including the principle of National Treatment, defined as follows:

> (...) national treatment shall mean, concerning any level of government or authority, treatment no less favourable than the treatment accorded by that level of government or authority to like, directly competitive or substitutable domestic goods, including those originating in the territory over which that level of government or authority exercises jurisdiction. (FTA, 2016, Art.21.2)

This principle was already in force since 1996 when Ecuador became part of the WTO, but its effect has multiplied in combination with tariff elimination of agricultural products (Paredes, 2019). Nevertheless, the FTA has excluded some sensible Ecuadorian products of this tariff elimination and has introduced a quota of metric tons with zero tariffs in products like milk. (FTA, 2016, Annex IV.7)

Regarding agriculture, the FTA creates the Subcommittee on Agriculture and includes the Section Fourth of Title III called "Agricultural Goods", specifically dedicated to regulating the options that subscriber countries would have to mitigate the potential impacts that tariff elimination might have on domestic food production. (FTA, 2016, Art.36)

One of the most relevant options is the possibility of applying an "agricultural safeguard[3] Measure in the form of

3 According to Article XIX of the GATT 1994 (General Agreement on Tariffs and Trade). A safeguard is a measure of urgency that can be implemented if, as a result of tariff concessions provided to the parties "imports of a product into the territory of this contracting party have increased by such quantity and are carried out under such conditions as to cause or threaten to cause serious injury to domestic producers of like products or directly competitive in that contracting party" (GATT, 1994). Then, the safeguards are intended to "prevent or remedy such damage, to suspend in whole or

additional import duties on originating agricultural goods" (FTA, 2016, Art.29). However, Ecuador should meet the following conditions:

1. The product should be included in the list of Annex VII "Covered goods and activation import volumes" of the FTA. Thus, the products to which an agricultural safeguard could be applied would be onions and shallots; some varieties of beans and dairy products (FTA, 2016, Annex VII. 1 and 2), provided that the amount of imports per year of these products exceeds a certain amount of tons set out in Annex VII of FTA. (FTA, 2016, Art.29.2)

2. The tariff added to the good as a safeguard measure cannot exceed the regular tariff charged to all other countries that are not part of the Agreement, but of the WTO (Most Favored Nation tariff). (FTA, 2016, Art.29.1)

3. This safeguard may not be adopted if the State has other types of safeguards, on the same good, in force. (FTA, 2016, Art.29.4)

4. No Party may adopt or maintain an agricultural safeguard measure from the date a good is duty-free. (FTA, 2016, Art.29.5.a)

5. The party applying an agricultural safeguard shall notify the exporting party in writing, within ten days, justifying the reasons for the measure. The exporting party shall have the opportunity to consult whether or not the application of the measure is relevant, and may activate the dispute settlement mechanism if it does not agree. (FTA, 2016, Art.29.6)

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in part the obligation incurred concerning that product or to withdraw or modify the concession

Consequently, one of the most relevant mechanisms to control the entrance of foreign products that may affect domestic production, and thereby food sovereignty, is the possibility of adopting an agricultural safeguard. However, there is the need to fulfil all the requisites mentioned above, and the safeguard cannot be applied to any agri-food goods that may be threatened. Only could be applied to "13 products, such as mature and semi-mature cheeses (humidity up to 63.5%) and peasant economy products such as onions and beans". (MCE, 2016, p. 1)

There are other options that the FTA presents in order to mitigate the adverse effects of this instrument in the local agricultural production, like the possibility to apply the Andean System of Agricultural Price Strips established in Decision 371 of the Andean Community of Nations (FTA, 2016, Art. 30) or the Technical Assistance to strength the Trade Capacities. (FTA, 2016, Art. 100)

However, it is necessary to consider that Free Trade Agreements and food sovereignty have different objectives. The first response to an exogenous development theory[4], While the second strongly supports an endogenous development theory[5] (Paredes, 2019). Additionally, according to Peter Halewood (2011):

> Trade liberalization can have detrimental effects on the long term food security of less developed countries. This includes the environmental damage that may result from a country's attempt to satisfy export demand. Rather than working under environmentally friendly standards or sustainability models for agriculture, forestry or fish stocks, many countries

4 According to Lee & Gimm (2009): "the approach considers the organizational structures of global firms' production systems as the determinants of growth and explores how nations are transformed by flows of capital, labour, and knowledge all of which are regarded as external factors" (p. 614)

5 According to Van der Ploeg & Long (1994): "endogenous development practices tend to materialize as self-centred processes of growth: that is, relatively large parts of the total value generated through this type of development are re-allocated in the locality itself". (p. 2)

> are forced to grapple with the global demand for these goods (...) Trade liberalization often has the distorting effect of shifting the limited amount of resources a less developed country may have from production geared towards local consumption to production for export to the global market. While the net benefit of producing goods for export may be high, it comes at a steep price for many people in developing countries. (pp. 126-228)

In this context, in Ecuador, after almost four years of its entry into force, the FTA has generated a wide range of effects. The most perceptible have been the ones associated with the Ecuadorian balance of payments. Thus, non-oil exports have growth of 540.7 million US dollars comparing the period January-April of 2018 and 2020. On the other hand, non-oil imports, in the same period, have to decrease 863.7 million US dollars. This tendency has been deeply influenced by the COVID-19 worldwide crisis and the recent plunge in oil prices (Banco Central del Ecuador, 2020). Moreover, in 2020 it is expected a reduction of EU international commerce in 9.2% of exports and 8.8% of imports. (Stearns, 2020)

Additionally, comparing the periods January-April 2018 and 2020, we should notice that the significant exports growth has focused in traditional goods, like banana, shrimps or cocoa, while non-traditional exports have grown only 93 million US dollar. It could mean that the FTA has not helped the State to diversify its production. (Banco Central del Ecuador, 2020)

As we can see, the effects and implications of the FTA in the Ecuadorian food sovereignty regime are even more challenging to assess in the current sanitary and worldwide economic crisis. Nevertheless, to contribute to further studies on the subject, in the next section, we will briefly analyze the relationship between the FTA and food sovereignty under an economic analysis of law perspective.

3. FTA AND FOOD SOVEREIGNTY: AN ANALYSIS FROM THE ECONOMIC ANALYSIS OF LAW

It is essential to establish that the Economic Analysis of Law (EAL) has descriptive, heuristic and normative aspects. According to Richard Posner (2009):

> As a heuristic, it seeks to display underlying unities in legal doctrines and institutions; in its descriptive mode, it seeks to identify the economic logic and effects of doctrines and institutions and the economic causes of legal change; and in its normative aspect, it advises judges and other policymakers on the most efficient methods of regulating conduct through the law. (p. 38)

In this sense, the Economic Analysis of Law aims to link critical economic concepts, such as efficiency, transaction costs and opportunity costs, with the different scenarios of legal and social application, contributing to the deep understanding of the structures underlying different legal realities, and; therefore, to the better construction of public policies and regulatory instruments.

It makes sense if we consider that law and market use prices as opportunity costs[6] That induce people to efficient maximization (Monroy, 2018, p. 713). Thus, for example, the legal system sets out the costs of people's acts, which can decide to do a particular action (regulatory hypotheses), knowing they will bear the costs that it entails (legal consequences). Likewise, Posner (1987) explains that the economic analysis of law has two basic premises:

> 1) People act as rational maximizers of their satisfaction in making such nonmarket decisions as to whether to marry or divorce, commit or refrain from committing

6 Also called alternative cost, it expresses the primary relationship between scarcity and choice. Opportunity cost is the anticipated value of "what would have been" if the choice made under a given circumstance would have been different. Therefore, in an environment where there is no shortage, there are no opportunities or alternatives to be sacrificed. (Buchanan, 1991, p. 520)

crimes, make an arrest, litigate or settle a lawsuit, drive a car carefully or carelessly, pollute (a nonmarket activity because pollution is not traded in the market), refuse to associate with people of a different race, fix a mandatory retirement age for employees.

2) Rules of law operate to impose prices on (sometimes subsidize) these nonmarket activities, thereby altering the amount or character of the activity (p. 5)

We can also appreciate opportunity and transaction costs[7] when we refer to the construction of the national regulatory system and the incorporation of binding international instruments into the current legal order, such as the FTA.

In economic terms, the FTA is a contract that could be defined as "the specification of actions that are supposed to be adopted by designated parties at various times, usually depending on the conditions governing the contract" (Shavell, 2004, p. 327). This kind of international instruments results from non-monetized transactions between States, whose purpose is not the exchange of goods or services, but rather the exchange of their jurisdiction, sovereignty or regulatory authority. (Monroy, 2018, p. 734)

In this sense, international transactions are often better understood as agreements in which States coordinate their actions, intending to lower transaction costs, allocating risks and acting efficiently[8]. In the particular case of the FTA,

7 are those "costs and expenses related to the activities carried out by a company to: acquire market information, draft contracts, conduct inspections, agree on disputes, cover contingencies, force compliance with legal and contractual rules (enforcement) and comply with health and tax provisions; to identify, negotiate and consummate an economic transaction. In broader terms, the "Direct Cost", ex-ante and ex-post, arising as a result of the completion of a commercial operation" (Silva, 2003, p. 11). According to Monroy (2018), in the context of international law, they are understood as the "costs associated with specifying and enforcing agreements". (p. 731)

8 Concerning the motivations for entering into international agreements such as the FTA, Shavell (2004) mentions the following: (i) provision of goods and services in the future. It often happens that one of the parties

the coordination between parties took place to establish an exchange relationship, not a cooperation relationship, as the parties gave up part of their sovereignty to establish a free trade area, negotiate tariff reductions and accept legislative limitations or adaptations, in order to obtain certain benefits.

In order to briefly assess whether the FTA has allowed the State to reduce transaction costs[9] Regarding food trade in the context of food sovereignty, it is necessary to consider these four fundamental factors proposed by Douglass North (1992): (i) the cost of measuring the valuable attributes of goods or services or the performance of agents in the exchange, related to the amount of information that the parties possess, which can help one benefit more than the other; (ii) the size of the market, which determines a personal or impersonal exchange; (iii) the contracts enforcement capacity; and, (iv) the existence of strong institutions to reduce the costs of measuring and enforcement of contracts, avoiding the taking of individual ideological perceptions and attitudes as parameters.

Regarding the first factor, the asymmetry between the FTA's subscriber parties regarding its economic, institutional and political conditions may make one more likely to know and measure the implications of the FTA (Janvry & Sadoulet, 1997). For instance, within the initial assessments of the costs of ratifying the FTA, the Ecuadorian State should have given primacy to the evaluation of the impacts on negotiated rights: a) the right to food; b) to a healthy environment; and, c) to sovereignty, which includes the dimension of food sovereignty.

will want to enjoy a good or service in the future and that the other party may provide such good or service, resulting in the fact that the desire to celebrate the contract is mutual (p. 332); (ii) Mutually beneficial risk-sharing (p. 333); (iii) guaranteed markets.

9 It is important to mention that transaction costs are expressed. Differently, ex-ante may refer to negotiation costs; ex-post can refer to realignment costs or renegotiation costs when agents make bilateral efforts to correct misalignments; the costs of establishing and managing a dispute resolution structure (which is not necessarily a court); and the costs of securing the commitments. (Monroy, 2018, p. 732)

However, because these measurements are quite costly, there is no evidence of pre-ratification governmental studies on the impacts of the FTA in these aspects. Also, if they would have existed, they would not have been useful, since Ecuador did not have the opportunity to widely negotiate its terms, adhering to the Agreement previously concluded with Colombia and Peru.

Referring to the size of the market, the commercial exchange generated between Ecuador and the European Union under the FTA is impersonal, representing higher costs to ensure the enforcement of the treaty (North, 1992). It is essential to mention that the FTA establishes transparent institutions (rules of the game) about the trade of agri-food goods, including tariff elimination annexes and the description of the processes to be carried out in the event of non-compliance.

However, there are no well-defined mandatory procedures for enforcing rules about trade and sustainable development (related to food sovereignty). Thus, the FTA only includes good-faith statements and reaffirms the parties' responsibility of respecting international conventions on adequate work or environmental care (FTA, 2016, Title IX Trade and Sustainable Development). This situation, in the context of an impersonal trade, could lead to opportunistic behaviours.

Therefore, to ensure that free trade in agricultural goods meets the objectives of food sovereignty, sustainable production and respect for human rights - established in the Constitution of the Republic- Ecuador must incur in high costs. They are considering that judicial institutions, for example, are not prepared for the adequate protection of food sovereignty. Not even the Constitutional Court, Ecuador's main constitutional justice body, conducted an adequate analysis of the possible impacts of the FTA on food sovereignty before its ratification. (Opinion No. 009-16-DTI-CC, 2016)

Regarding the fourth factor for assessing transaction costs, Ecuador does not present institutional or organizational strength[10] (loud and stable entities responsible for compliance with the rules of the game) to reduce the costs of measuring and enforcing the FTA's provisions related to sustainable development and agri-food trade, since there is no uniform agricultural and commercial, public policy that favours food sovereignty over agribusiness (Cherrez & Herrera, 2016). With this institutional weakness, it is costly for the State to observe the FTA's provisions while ensuring compliance with the legal regime of food sovereignty.

Hence, the FTA fails to reduce transaction costs if we evaluate the agri-food trade from a food sovereignty approach (and we should consider that food sovereignty is a strategic objective and a State obligation), but it does reduce those costs if we look at food trade from a free-market perspective that favours agribusiness. On the other hand, it is essential to mention that the lack of compliance with food sovereignty regime is not new, and has not started because of the ratification of the FTA, although this international instrument has reduced the State's capacity to act in this area. (Janvry & Sadoulet, 1997)

However, the study of transaction costs is directly related to the estimation of the efficiency [11] of a particular contract, or in this case, of an international treaty (Ferro, Lentini & Romero, 2011). There are two main types of efficiency, technical and allocative. Technical efficiency is traditionally understood as "obtaining as much product as possible, from a given set of inputs" (Ferro et al., 2011, p. 9), i.e. implies a profit maximization.

10 Thus, in a brief period, the regulations and public institutions which govern the issues of foreign trade, agriculture, fisheries, environment, water and land have presented changes in their structural organization, name and category (DE- 533, 2018; DE-559, 2018). It shows that there is no stability in terms of the normative or political organization regarding aspects of food sovereignty.

11 When we talk about efficiency, in general, we are referring to economic or total efficiency, which is shaped by the union of technical efficiency (maximizing benefits) and allocative efficiency (cost minimization)

This concept implicitly entails the fact that there are scarce resources that must be used to make the most of their potential. Thus, in the case of trade agreements, states should aim to generate the most significant amount of satisfaction of their population needs, based on the specific circumstances and resources (economic and political) that they have. (Ferro et al., 2011)

Related to agri-food trade guided by a food sovereignty logic, the FTA would not generate technical efficiency, because it does not allow the local Ecuadorian food producers to maximize their profit with fewer production resources. Instead, it involves additional costs because peasants must invest more to compete with the massive inflow of European agricultural products. (Ferro et al., 2011)

A different circumstance is observed regarding large-scale agricultural producers, for which the FTA generates technical efficiency because they can produce and export more products at lower costs, considering that chemical inputs, for example, are imported from the EU at lower prices, thanks to the tariff reduction agreed in the FTA.

Thus, it means that the FTA does not allow the maximization of small producers well-being, and instead generates poverty growth and rural marginalization; however, it does allow the maximization of extensive agribusinesses well-being that have the most significant tariff and trade advantages for export.

Regarding allocative efficiency, understood as the obtention of a product at the lowest possible cost by performing an efficient reallocation of productive resources, we can mention that the FTA is efficient, if we evaluate food trade in general, because it allows to minimize production costs and increase exportations with the corresponding increase in profits. However, if we assess food trade from a food sovereignty perspective, which should be done by constitutional provision, the FTA does not represent allocative efficiency, because it increases the costs of agroecological and sustainable production.

It can create several adverse effects, for example, worse working conditions in the countryside, or pollution from excessive use of chemical inputs, resulting in more expensive for the country over time. Consistent with the above, Janvry & Sadoulet (1997) state that any globalizing process as the FTA, mainly involves two negative welfare consequences:

> One is the creation of transitory poverty associated with the redefinition of economic activity, such as loss of a job, falling profitability of activities exposed to international competition, and in the general devaluation of the factors that were scarce in each economy before trade opening. These effects can be attended through compensatory programs (...) complemented by general safety nets such as food subsidies and unemployment insurance. The other type, which is more difficult to handle, is the exclusionary effect of globalization whereby many households and communities that were poor before [FTA] will remain marginalized from the process, and thus with increasingly distant welfare levels compared to those who capture the gains from globalization. (p. 15)

In this sense, free trade agreements such as the FTA generate polarization between those who benefit (agribusiness) and those who are harmed (small producers) by trade liberalization measures. In this regard, Calabresi & Melamed (1972) state that in these cases, the State must decide which party to favour and, therefore, establishes through legal institutions (rules of the game). Therefore, the different "entitlements"[12].

12 About entitlements, Calabresi & Malamed (1972) mention: "Whenever a state is presented with the conflicting interests of two or more people or two or more groups of people, it must decide which side to favour. Absent such a decision, access to goods, services, and life itself will be decided based on "might makes right" - whoever is more robust or shrewder will win.3 Hence the fundamental thing that law does is to decide which of the conflicting parties will be entitled to prevail. The entitlement to make noise versus the entitlement to have silence, the entitlement to pollute versus the entitlement to breathe clean air, the entitlement to have children versus the entitlement to forbid them these are the first order of legal decisions". (p. 1090)

Thus, if we consider that the entitlement in the conflict was the ratification or not of the FTA, the State had to analyze in-depth the three main reasons for granting entitlement, namely "economic efficiency, distributional preferences and other justice considerations" (Calabresi & Melamed, 1972, p. 1093). Economic efficiency implies that, in the presence of different transaction costs, the State must decide on the entitlement that reports lower costs.

Consequently, before ratifying the FTA, the Ecuadorian government should have assessed the benefits it would bring, the social costs of obtaining those benefits, and the social costs of avoiding or remedying negative costs. However, this was not done in-depth, nor it was noted that "(...)in the absence of certainty as to whether a benefit is worth its costs to society, that the cost should be put on the party or activity (...) which can with the lowest transaction costs act in the market to correct an error in entitlements". (Calabresi & Melamed, 1972, p. 1097)

In this context, the ratification of the FTA was not an efficient decision to promote the exchange of agricultural goods guaranteeing food sovereignty, mainly because the social costs in the countryside are higher than the benefits that the FTA brings to small producers. Moreover, we say that it is not efficient, because the cost of the Agreement is placed on the poorest (small agricultural producers), that is, on those who are less prepared to deal with them.

There are also distributional objectives that underpin the State's choice of some entitlements. In all societies, we find different preferences in the distribution of wealth, such as class preferences or greater social equality. In the case of Ecuador, for example, article 3 of the Constitution establishes as the primary duty of the State: "to plan the national development, eradicate poverty, promote sustainable development, and equitable redistribution of resources and wealth, in order to access good living". (CRE, 2008)

In this context, the State should choose the entitlement that is considered the most favourable to general well-being and equity objectives. Therefore, the correct choice, in distributional terms, might have been the non-ratification of the FTA, although many other factors influenced this decision (Calabresi & Melamed, 1972).

In addition to efficiency and distributional objectives, there are other reasons for justice to opt for a particular entitlement (in this case, the different entitlement is whether or not to ratify the FTA). However, it is quite complex to analyze a particular state election in this regard, as some consider that “what sounds like a justice standard is simply a handy way of importing efficiency and distributional notions too diverse and general in their effect to be analyzed fully in the decision of a specific case”. (Calabresi & Melamed, 1972, p. 1103)

However, there are three types of entitlements:

The entitlement protected by property rules, in the sense that “someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller”. (Calabresi & Melamed, 1972, p. 1092)

Those protected by liability rules presented when “someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it”. (Calabresi & Melamed, 1972, p. 1092)

Those protected by inalienability rules, or basic entitlements, whose transfer is not permitted.

The rules of inalienability “not only protect but can also be seen as limiting or regulating the granting of entitlements itself”. (Calabresi & Melamed, 1972, p. 1111)

The ratification of the FTA represents a case in which economic efficiency on agricultural goods trade is caused by the limitations imposed to the State by the Agreement, especially in

terms of food sovereignty. It generates significant externalities (Calabresi & Melamed, 1972), which may justify the application of an inalienability rule, mainly when external costs

> (...) do not lend themselves to standard measurement, which is acceptably objective and non-arbitrary. This non-monetizability is characteristic of one category of external costs which, as a practical matter, frequently seems to lead us to rules of inalienability. Such external costs are often called moralisms". (Calabresi & Melamed, 1972, p. 1112)

CONCLUSION

In Ecuador, the implementation of food sovereignty as a sustainable food production system that leads to local production improvement and respect to human rights, is -and certainly will be for a while- an incomplete promise. Although the Ecuadorian Constitution recognizes it as a strategic objective and a State obligation, there are not enough enforcing mechanism to avoid, for example, the adoption of international instruments that are not aligned with its objectives. It is the case of the FTA, which have generated high costs regarding the food sovereignty regime compliance, and negative externalities for domestic agricultural production. All of this may suggest the importance of applying an inalienability rule to avoid the mentioned external costs, by renegotiating the FTA and adopting new strategies to strengthen the Ecuadorian countryside.

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Analisi dell'applicabilitá della solidarietá contrattuale in Ecuador

Analysis of the viability of applying the Contractual Solidarity in Ecuador

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SOMMARIO: Al giorno d'oggi, l'inadempimento degli obblighi contrattuali ha causato un grande dibattito in dottrina, a causa della necessità di relazioni contrattuali meno suscettibili di estinzione e di figure che evitino tale estinzione. Per questo motivo, una parte della dottrina ha preferito optare per rimedi meno ortodossi che consentano di risolvere le controversie senza avviare processi giudiziari. L' articolo analizzerà la fattibilità dell'applicazione di una figura come la solidarietà contrattuale in Ecuador. Inoltre, le caratteristiche del sistema giuridico ecuadoriano consentirebbero l'applicazione di questi rimedi pur con difficoltà attraverso la buona fede. A tal fine, verrà prima analizzato il contratto e il suo inadempimento nell'ambito del diritto civile e nel contesto ecuadoriano. Successivamente, verrà esplorata brevemente la solidarietà contrattuale e l'ultima sezione studierà la possibilità di applicare questa figura nel sistema giuridico ecuadoriano e le conseguenze che ciò comporterebbe.

PAROLE CHIAVE: diritto dei contratti, responsabilità legale, teoria legale, sistemi legali, dottrina.

ABSTRACT: Nowadays, the breach of contractual obligations has caused great debate in the law academy, this due to the need for contractual relationships that are less susceptible to extinction and figures that avoid this extinction. For this reason, a part of doctrine has preferred to opt for less orthodox remedies that allow the resolution of controversies without initiating judicial processes. Due to the above, this article will analyze the feasibility of applying a figure such as contractual solidarity in Ecuador. Furthermore, the characteristics of the Ecuadorian legal system would allow the application of these remedies despite difficulties through good faith. For this purpose, the contract will first be analyzed as a figure and the breach within the field of Civil law and in the Ecuadorian context. Afterwards, contractual solidarity will be explored briefly, and the last section will study the possibility of applying this figure in the Ecuadorian legal system and the consequences that this would entail.

KEY WORDS: contract law, legal liability, legal theory, legal systems, doctrine.

INTRODUZIONE

Gli ordinamenti di *civil law* regolano con modalità differenti la risoluzione contrattuale per inadempimento. Al modello giudiziale si è oggi affiancato in alcuni sistemi quello extragiudiziale unilaterale, che consente al creditore di risolvere il contratto nei casi di inadempimento della prestazione da parte del debitore senza ricorrere al giudice. L'art. 1226 del codice civile francese prevede che "il creditore può, a proprio rischio, risolvere il contratto mediante notifica. Tranne che in caso di emergenza, deve prima dare un preavviso formale al debitore inadempiente per rispettare il proprio impegno entro un termine ragionevole". Parte della dottrina (Dellacasa,2015) ha sottolineato come tale figura sembri consentire una maggiore rapidità e minori costi, adattandosi alle esigenze del mondo degli affari.

Tuttavia, il tema della risoluzione per inadempimento appare assumere oggi, in America Latina, profili delicati a causa delle misure restrittive adottate dai governi per salvaguardare la salute pubblica di fronte alla pandemia di Covid19: la maggior parte dei contratti non è stata adempiuta o non potrà esserlo, le persone non sono nelle condizioni di pagare i debiti o, addirittura, preferiscono non farlo e risparmiare quanto possibile al fine di avere i mezzi necessari per affrontare un possibile contagio. Inoltre le risorse economiche devono essere riorientate per evitare un collasso nel settore della sanità pubblica. Tale situazione complessa si rinviene in Ecuador, nonostante le restrizioni siano state progressivamente diminuite: il lavoro si è fermato, le aziende, non producendo, non hanno una sufficiente liquidità per garantire posti di lavoro e nuovi investimenti, Si tratta di una economia quasi bloccata, anche per il terrore di nuove ondate di contagi.

Mentre si dubita dell'efficacia delle nozioni tradizionali di "impossibilità sopravvenuta" ed "eccessiva onerosità" per fronteggiare la pandemia, la possibilità di utilizzare la solidarietà per imporre un obbligo di rinegoziazione o modificare i contratti tutelando parti inadempienti a causa della situazione difficile è una delle soluzioni avanzate sia in America Latina sia in Europa. In Italia, infatti, anche la dottrina che "ha spesso denunziato l'uso, a tratti spregiudicato, dell'argomento costituzionale nel ragionamento civilistico, apparsogli, in più occasioni, un comodo espediente per sottrarsi alla fatica del concetto e per veicolare, tramite ragionamenti breviloqui, soluzioni che avrebbero dovuto argomentarsi attraverso puntuali norme positive, agevolandone così il controllo razionale. Tuttavia, nei tempi eccezionali che viviamo, le norme positive (tese, come sono, alla distruzione del vincolo più che alla sua conservazione) certamente non soccorrono. Proprio per questo, oggi, si possono e si devono chiamare in campo la buona fede contrattuale e i principi costituzionali, per preservare, loro tramite, l'economia di scambi congegnati in tempi normali ma irrimediabilmente alterati, per cause di forza maggiore, in tempo di emergenza" (Benedetti-Natoli, 2020).

In questo scenario, deve, dunque, essere valutata l'applicabilità della solidarietà contrattuale e la possibilità di una sua eventuale estensione a tutti i casi nei quali ricorrono gravi squilibri contrattuali. Il problema appare particolarmente avvertito in Ecuador in assenza di quello che pare essere un contesto giuridico, economico e sociale adatto. Come ha rilevato una autorevole dottrina "la parola solidarietà evoca concetti e dati dell'esperienza come amicizia, carità, benevolenza e accostata a diritto suggerisce connessioni, distinzioni, contrapposizioni tra quelli ed il fenomeno giuridico …si agita…tutta una sostanza di atteggiamenti spirituali e relazioni con il prossimo, quello al quale si è legati da particolari rapporti e quello invece anonimo con il quale entriamo in contatto in maniera casuale, ancorché assidua" (Rescigno, 2006 pp. 6-8.) La figura della solidarietà contrattuale, nata come contrappeso alla totale libertà delle parti che caratterizzava la visione tradizionale del contratto, si riviene oggi in numerosi ordinamenti tra i quali quello francese e italiano.

1. IL CONTRATTO, L' INADEMPIMENTO E L'ORDINE LEGALE ECUADORIANO

La base dello scambio economico di tutte le società è il contratto che nasce dalla libera volontà delle parti contraenti: "la libertà contrattuale si riferisce a quella libertà che il sistema giuridico garantisce ai cittadini di stipulare accordi che in un determinato quadro giuridico possono essere validi e legalmente applicabili" (Chamié, 2018, p.195) Nel contesto ecuadoriano, il codice civile lo definisce nel modo seguente: "il contratto o la convenzione è un atto con il quale una parte concorda con un'altra di dare, fare o non fare qualcosa. Ogni parte può essere costituita da una o più persone". (Codice civile, 2005, art. 1454). L' accordo ha forza di legge tra le parti, che possono determinare liberamente i benefici e i rispettivi obblighi. Se in un contesto ideale ogni contraente ricava un vantaggio, nella realtà ciò non sempre avviene. Bisogna distinguere, perciò, i casi in cui questo succede per un normale rischio d'impresa da quelli nei quali la perdita deriva da abusi o scorrettezze, magari aggravate da asimmetrie.

In tal senso Momberg ha rilevato come "in termini generali, la forza vincolante del contratto implica che le parti devono rispettare gli obblighi che hanno validamente contratto, avendo questo forza vincolante per loro e quindi esecutività. Nella sua concezione tradizionale presuppone anche l'intangibilità del contratto, in modo che né le parti (con l'ovvia eccezione del mutuo consenso) né il giudice possano variare i termini di un contratto validamente concluso". (citato in Accatino, 2015, p.37).

L'obiettivo del rapporto contrattuale, infatti, è che duri e gli obblighi contrattuali determinati siano effettivamente adempiuti e quindi soddisfino gli interessi di entrambe le parti.

> Tuttavia, "gli effetti delle obbligazioni, che compongono le disposizioni delle parti contraenti in tutti i contratti, sia consensuali o meno, ruotano, come già accennato, attorno a due possibilità: esecuzione o inadempimento. È sia l'inadempimento da parte dell'uno o dell'altro contraente, sia la sua esecuzione che sono previsti dalle parti. Ciò è evidente quando esse contemplano espressamente la violazione delle obbligazioni e ne stabiliscono la sanzione"(Lecuyer,2010, p.47).

Nella sua essenza, la teoria tradizionale configura il contratto come una relazione di reciprochi obblighi delle parti diretti a soddisfare reciproci interessi per cui l'inadempimento di un contraente si traduce in una grave insoddisfazione dell'altro. Pertanto,

> ... l'obbligazione è concepito come un dovere di collaborazione intersoggettiva, la cui funzione è proprio quella di soddisfare l'interesse del creditore, soddisfazione per la quale il debitore deve impiegare tutti i suoi sforzi, alle condizioni corrispondenti alla natura della prestazione, alle disposizioni generali e specifiche di legge, alle obbligazioni derivanti dall'esercizio dell'autonomia privata, oltre alle clausole contrattuali. La soddisfazione del creditore, generalmente effettuata dal debitore, l'unico ad esso obbligato, ha l'effetto di estinguere l'obbligazione, poiché la sua funzione è stata

svolta e, di conseguenza, rilascia il debitore (solutio). L'insoddisfazione del creditore, totale o parziale, transitoria o definitiva, implica un'anomalia, che di solito è attribuita al debitore e, più specificamente, al suo comportamento scorretto, indipendentemente dall'onere della prova"(Hinestrosa, 2016, p. 5).

Nei casi di inadempimento il codice civile ecuadoriano stabilisce il diritto del creditore di chiedere l'adempimento: " ogni obbligazione personale dà al creditore il diritto di eseguirla su tutti i beni immobili o mobili del debitore, siano essi presente o futuri (C.C, 2005, art. 2387)". Ciò implica che il giudice può obbligare il debitore all'adempimento. Non si tratta, però, di "una creazione artificiale, qualcosa costruito senza fondamento nella vita reale. Al contrario, l'obbligazione del contratto trova solide basi nei vari settori rispetto alla libertà creativa dell'uomo; all'iniziativa privata, come generatrice di ricchezza e di conseguenza attivatrice del benessere sociale ..." (García-Agúndez, 1983, p.7).

Benché normalmente le parti non violano i doveri nascenti dalla *lex contractus* liberamente voluti, può verificarsi un inadempimento totale o parziale, cioè una deviazione rispetto al programma contrattuale pattuito (Gómez, 2007 p.7), il che fa sorgere in capo al creditore il diritto a ricevere ciò che è dovuto più i danni causati. Secondo il codice civile ecuadoriano il risarcimento dei danni comprende danni consequenziali e perdita di profitti, indipendentemente dal fatto che derivino dal mancato rispetto dell'obbligo o dall'adempimento imperfetto o dal ritardato rispetto (CC, 2005, art. 1572). Tuttavia, è riconosciuto che eventi di forza maggiore o caso fortuito che non erano prevedibili al momento di conclusione del contratto e indipendenti dalla sfera di controllo del creditore possono giustificare l'inadempimento. E' infatti una "applicazione della massima secondo la quale" nessuno è obbligato all'impossibile" " (Castro Ruiz, 2015, p.442).

In alcuni ordinamenti, si ha una esemplificazione legislativa delle ipotesi che possono essere ricomprese nel caso fortuito o nella forza maggiore; in altri vi è una definizione generale. Un esempio del primo modello è l'Ecuador, in cui il

codice civile stabilisce che "si chiama forza maggiore o evento fortuito, l'imprevisto a cui non è possibile resistere, come un naufragio, un terremoto, l'arresto di nemici, gli atti di autorità esercitati da un pubblico ufficiale, ecc." (C.C, 2005, Art.30). Muovendo da questa previsione normativa, la dottrina e la giurisprudenza si sono concentrate sulla individuazione di altre fattispecie analoghe. Nel contratto di lavoro, ad esempio, esse ricorrono quando il fatto che provoca il licenziamento è imprevisto e irrimediabile per il datore di lavoro, e il suo verificarsi non è imputabile al datore di lavoro se esiste una relazione di causa ed effetto tra l'evento fortuito o la forza maggiore e la fine del rapporto. (Castro, 2015, p.15)

L'ordinamento italiano prevede all'art. 1218 c.c. it. che il debitore che non esegue esattamente la prestazione dovuta è tenuto al risarcimento del danno se non prova che l'inadempimento o il ritardo è stato determinato da impossibilità della prestazione derivante da causa a lui non imputabile In senso analogo l'art. 1256 c.c. afferma che l'obbligazione si estingue quando, per una causa non imputabile al debitore, la prestazione diventa impossibile. E' stato messo in luce, tuttavia, che l'"impossibilità non costituisce una nozione astratta, valida per tutti i rapporti di obbligazione, e non esprime un carattere dell'evento, ma è un giudizio che si formula col riferirsi alla prestazione dedotta in obbligazione" (Gambino, 2015, p 192) con riferimento a ciò che le parti hanno espressamente disposto o implicitamente convenuto e, quando, occorrono integrazioni o specificazioni ulteriori in base ad un criterio generale di ragionevolezza ed efficienza" (Trimarchi, 2008, p. 349), secondo la natura e gli scopi del contratto.

Sia in Ecuador che in Italia sembra invocabile l'impossibilità sopravvenuta della prestazione per *factum principis* nel caso del Covid-19 in relazione alle misure governamentali con le quali è stata interrotta o limitata l'attività produttiva. Tuttavia, posto che essa non riesce a disciplinare tutte le fattispecie verificatesi in concreto, nella dottrina ecuadoriana si assiste ad un dibattito sulla opportunità di estendere l'uso della buona fede in modo da fronteggiare in modo più flessibile ed adeguato i problemi causati dalla pandemia e rendere più efficienti le relazioni contrattuali. Una soluzione

potrebbe essere il ricorso alla figura della inesigibilità: qualora la prestazione fosse ancora possibile, ma comportasse un sacrificio eccezionale e irragionevole, l'impossibilità si potrebbe qualificare come "inesigibilità" mediante l'applicazione del principio di buona fede nel rapporto obbligatorio e nel contratto. Si consideri un'impresa che non adempie perché i suoi fornitori sono in quarantena e non riesce se non con sforzi abnormi e troppo onerosi. Luigi Mengoni avverte come l'inesigibilità "non appartenga agli impedimenti oggettivi della prestazione...(e) può determinarsi in ragione non solo di preminenti interessi non patrimoniali inerenti alla persona del debitore, ma anche di un pericolo imprevedibile di danno grave ai suoi beni, in particolare alla produttività della sua azienda" : la buona fede impone, infatti, un limite all'esercizio del diritto di credito.

2. LA SOLIDARIETA'CONTRATTUALE

Dall'introduzione del *Code civil* del 1804, la dottrina si è concentrata sull'esame della natura e dei limiti del principio dell'"autonomia privata", criticato da alcuni autori per essere un "il concetto illimitato di libertà che deriva dall'instaurazione di obblighi con il debitore. La libertà di contrattare mette in secondo piano l'intervento statale, muovendo dal volontarismo esacerbato e dal liberalismo economico" (Tito, 2019). Da questa visione origina la teoria della solidarietà che cerca di evitare l'abuso del concetto di libertà contrattuale e anticipa l'inizio delle idee sociali dell'intervento statale attivo nelle relazioni economiche:

> Infatti "a causa delle incoerenze generate dalle espressioni puramente formali del principio dell'autonomia della volontà, la dottrina del "Solidarismo contrattuale, o del" Diritto sociale "è sorta in Francia a metà del XIX secolo, e afferma che ognuna delle parti coinvolte in un contratto debba tenere conto dell'interesse del suo contraente, al fine di garantire che convergano efficacemente nel rapporto contrattuale i classici postulati ius-privatistici, come la sicurezza giuridica e la stabilità con altri principi quali la proporzionalità, la coerenza, la lealtà, la giustizia e soprattutto la solidarietà ". (Morgestein, 2015, p.196)

È così che viene sviluppata un›altra concezione secondo la quale i contraenti mantengono ancora la libertà di determinare ciò che è conveniente per loro, ma allo stesso tempo considerano da una prospettiva sociale e solidale ciò di cui l'altra parte ha bisogno e non solo il loro interesse personale. Ciò tenderebbe a garantire il principio di giusto equilibrio e stabilità contrattuale.

Questo comporta l'affidamento in "un atteggiamento di collaborazione, di mutuo aiuto, indipendentemente da quanto distanti possano essere i loro interessi e porta a respingere gli atteggiamenti contraddittori che le parti possono avere, in quanto si basa precisamente su principi quali buona fede, lealtà e coerenza contrattuale, tra gli altri. I solidaristi criticano il diritto classico perché connotato da uno scopo egoistico e ritengono che la legge e i giudici debbano intervenire per evitare abusi e ristabilire l'equilibrio nei contratti" (Bernal, 2007, p.18).

Considerando la solidarietà come un meccanismo che reincorpora l'equilibrio sociale, così da impedire il compimento di condotte sleali e strettamente egoistiche, viene limitata la rigidità del diritto contrattuale. Tuttavia, essa non potrebbe esistere senza il principio di buona fede, che si traduce in fiducia e lealtà tra le parti: "la solidarietà contrattuale si basa sul principio di buona fede, che funge da parametro di etica contrattuale. La buona fede modella l'autonomia privata perché determina la forza dell'obbligo e (impone) che i contraenti debbano comportarsi con lealtà e onestà. La solidarietà entra e assume rilevanza nei contratti attraverso la clausola generale di buona fede". (Benítez, 2013, p.147).

Nell'ordinamento italiano, tale clausola generale è divenuta una "sorta di valvola di sicurezza che allarga le maglie del tessuto normativo, lo salda alla storia e ai contegni mutevoli degli uomini e agevola gli scopi di chi nel diritto scorge un organismo aperto e pronto a espandersi sulla base delle istanze che la società accumula nel corso del tempo" (Corradini,1970, p. 491). Essa ha subito una progressiva evoluzione: mentre all'inizio era usata in modo contenuto considerando l'interesse dell'operazione economica e quindi in connessione alle lacune delle norme e a quelle che sorgevano necessariamente dalla lettura del contratto, è stata allargata progressivamente portando

alla sua concreta applicazione attraverso la costruzione di\ figure dogmatiche ormai affermate quali l'abuso del diritto, il *venire contra factum propium*, i doveri di protezione e ed è usata come fonte d' integrazione superando quella che è l'equità dell'art. 1374 c.c. it.

L'estensione nel suo utilizzo è dovuta anche all'indirizzo confermato dalla Corte Costituzionale che collega la buona fede all'art 2 della Costituzione e ad un mutato clima giuridico/ culturale, che attenua il rigido positivismo per affermare il ruolo creativo della giurisprudenza. Quella italiana ha, infatti, affermato ormai l' "acquisita consapevolezza della intervenuta costituzionalizzazione del canone generale di buona fede oggettiva e correttezza, in ragione del suo porsi in sinergia con il dovere inderogabile di solidarietà di cui all'art. 2 Cost., che a quella clausola generale attribuisce all'un tempo forza normativa e ricchezza di contenuti, inglobanti anche obblighi di protezione della persona e delle cose della controparte, funzionalizzando così il rapporto obbligatorio alla tutela anche dell'interesse del partner negoziale" (Cassazione civile sez. un., 15/11/2007, n. 23726) .

La dottrina ha, però, messo in luce come non si sia mai offerto un criterio di concretizzazione del contenuto solidarista della buona fede, limitandosi ad enunciarlo (Grondona, 2004). Tale aspetto è decisivo perché permetterebbe di estendere il concetto di solidarietà ai casi nei quali è effettivamente necessario e fondato su esigenze di tutela della persona. Spesso, invece, serve solo come argomento retorico, privo di contenuto, per giustificare soluzioni di rottura o imprevedibili, che diversamente sarebbero difficilmente comprensibili o accettabili. Questo ha riflessi negativi perché non aiuta un dibattito obiettivo sul tema che resta pertanto sul piano dell'emozione. Qualora si desideri perseguire una effettiva solidarietà, appare necessario individuare le ipotesi o i criteri di applicazione e i limiti in modo da evitare soluzioni che possano apparire teoricamente corrette ma nella pratica ingiuste oppure non seriamente giustificate. Bisogna evitare, insomma, un solidarismo indifferenziato e riduttivo a favore di una attenzione alle situazioni effettivamente meritevoli.

La valorizzazione della solidarietà attraverso la buona

fede può consentire in determinate circostanze una migliore rimodulazione degli interessi delle parti:

> ...la solidarietà contrattuale mette in discussione il dogma dell'autonomia della volontà secondo la quale l'individuo è il miglior conoscitore dei suoi interessi. Mette in dubbio l'idea che le parti dovrebbero essere le uniche a valutare il contratto e (dubita che) il fatto che sia negoziato implichi necessariamente che sia equilibrato e che sia impossibile intervenire al fine di garantire la certezza del diritto. Questa dottrina cerca di conciliare i classici imperativi di stabilità e certezza del diritto con principi come la solidarietà.". (Bernal, 2007, p.17)

Tale concezione ha, dunque, lo scopo sia di affrontare l'inadempimento contrattuale sia di conformare le modalità con cui le parti cooperano tra loro. Per questo motivo, essa è presente non solo in ogni momento della vita del contratto, ma anche prima della sua stipulazione e successivamente alla sua estinzione.

Nella fase precontrattuale la solidarietà tende a una "trattativa pulita" basata sulla buona fede, che svolge un ruolo fondamentale. Nel diritto italiano l'art. 1337 c.c. it.. impone alle parti di comportarsi secondo buona fede nella fase di formazione del contratto. Il dovere è consacrato ormai in tutti gli ordinamenti e anche nei progetti internazionali ed europei. L'art. 2.1.15 dei Principi Unidroit stabilisce che "(1) Una parte è libera di negoziare e non è responsabile per il mancato raggiungimento di un accordo (2) Tuttavia, una parte che negozia o interrompe le trattative in malafede è responsabile delle perdite causate all'altra parte. (3) È in malafede, in particolare, che una parte cominci o continui le trattative quando non intende raggiungere un accordo". La medesima norma si ritrova all'art. 2: 301 dei PECL. E analogamente all'art. II.-3: 301 del DCFR prevede che "(2) Una persona impegnata nelle trattative ha il dovere di negoziare secondo buona fede e correttezza e di non interromperle violando la buona fede e la correttezza. Questo dovere non può essere escluso o limitato dal contratto. (3) Una persona che lo ha violato è responsabile

per qualsiasi danno causata all'altra parte dalla violazione. (4) È in contrasto con la buona fede e l'equità, in particolare, per una persona avviare o proseguire le trattative senza alcuna reale intenzione di raggiungere un accordo con l'altra parte ".

Durante la relazione contrattuale può servire a valutare i comportamenti delle parti, impedendo determinati abusi: infatti, "oltre ad un semplice obbligo passivo di rispetto, è incluso anche un obbligo attivo di collaborare alla realizzazione dell'oggetto del contratto" (Bernal-Fandiño, 2007, p.24).

Infine, nella fase post-contrattuale, la solidarietà contrattuale tutela gli interessi delle parti, controllando le condotte successive che potrebbero ledere il principio di lealtà e di affidamento. Si pensi, ad esempio, agli obblighi di segreto che ciascuna parte deve mantenere anche dopo la fine del rapporto. Si può fare un'altra ipotesi: durante l'esecuzione di un contratto una parte viene a conoscenza di un affare a seguito della natura del suo incarico e lo conclude dopo la estinzione del contratto. Anche qui nasce l'obbligo per buona fede di darne comunicazione e di fare partecipe dei vantaggi anche il vecchio contraente.

Nel momento attuale sembra rilevante esaminare il ruolo che potrebbe avere la buona fede durante la vigenza del rapporto: soprattutto perché

"è necessario adeguare le prestazioni mediante rinegoziazione o adattamento e cercare il soddisfacimento dell›interesse contrattuale delle parti prima di frustrarlo completamente e terminare il rapporto. In questo modo, si rinviene il dovere di ripristinare l'equilibrio delle prestazioni secondo uno spirito di cooperazione e solidarietà.". (Chamié, 2008, p.133). Ciò permetterebbe inoltre di mantenere e preservare i principi dell'equilibrio contrattuale rimodulandone il contenuto, nei casi identificati dalla legislazione come "forza maggiore o evento fortuito" alla luce della situazione pandemica e della crisi economica profonda.

Sebbene teoricamente la dottrina della solidarietà contrattuale possa fornire una soluzione a rimedio dei rischi che talvolta discendono dall'autonomia privata e

dall'inadempimento contrattuale, è stata fortemente criticata da coloro che aderiscono alla teoria classica. Si è obiettato che la solidarietà è lontana dalla realtà in cui vengono creati i contratti. Inoltre, è stata discussa l'interferenza nell'autonomia privata che è considerata la principale caratteristica di differenziazione con la dottrina tradizionale. A queste critiche si è opposto come, "nonostante le obiezioni dei suoi oppositori, la solidarietà non solo rafforza le figure esistenti, ma fornisce loro una nuova interpretazione e un nuovo uso. Questa scuola ha una visione dinamica dei principi di buona fede ed equità, da cui emergono nuovi doveri "(Bernal, 2007, p.19).

La solidarietà contrattuale può essere definita come una figura distante dalla classica visione del contratto fissata nei codici ottocenteschi, che mira a proteggere i principi di equilibrio, lealtà e cooperazione tra le parti in ciascuna delle fasi contrattuali.

3.-VIABILITÀ DELL'APPLICAZIONE DELLA SOLIDARIETÀ DEL CONTRATTO IN ECUADOR

a) LA GIURISPRUDENZA COME FONTE DI DIRITTO

Nonostante in Ecuador la figura della solidarietà fosse estranea alla disciplina del contratto, a partire dal 2008, con la Costituzione di Montecristi, è iniziato un percorso che può essere definito "neo-costituzionalista" e di conseguenza si assiste ad un primo tentativo della giurisprudenza di costituzionalizzazione del diritto privato (Eyzaguirre, 2013, p. 153). Il tema richiama il dibattito sviluppatosi in Germania sulla Drittwirkung, dove la dottrina ha avvertito che "la differenza tra legislazione e giurisdizione, inizialmente concepita soltanto in termini qualitativi, appare sempre più evanescente" (Oeter, 2018, p. 202)

Si determina, dunque, un cambio di paradigma: quando è affermata la necessità di introdurre una figura come la solidarietà contrattuale in un sistema di civil law, sembrerebbe inevitabile ritenere che debba avvenire per legge. Tuttavia, la giurisprudenza francese ha dimostrato il contrario: "la sentenza Expovit, della della Corte di cassazione francese, del 25 febbraio

1992, è stata interpretata come obbligo di solidarietà del datore di lavoro nei confronti del lavoratore. In questo caso, un dipendente è stato licenziato per cessazione della sua posizione. Giorni dopo, però, ne era stato assunto un altro per una mansione le cui competenze erano simili a quelle del dipendente licenziato giorni prima. La Corte ha ritenuto che il datore di lavoro avrebbe dovuto adempiere il contratto di lavoro in buona fede, assicurando l'adattamento dei dipendenti all'evoluzione del loro lavoro (Bernal-Fandiño, 2007, p.27). Deve essere segnalato, poi, che la riforma del 2016 del diritto contrattuale, recependo numerose soluzioni già precedentemente consacrate dalla giurisprudenza, ha ampliato il ruolo della buona fede dalla fase di esecuzione del contratto a principio direttivo che deve guidare l'opera del giudice, riconoscendo, poi, espressamente il dovere di comportarsi "imperativamente" secondo buona fede nelle trattative (art. 1112). (Bernal-Fandiño, 2007, p.22).

Anche in Colombia è stata la giurisprudenza costituzionale a consentire l'ingresso di principi discendenti dalla solidarietà contrattuale: "la giurisprudenza ha evidenziato che determinati settori, come quello finanziario o dell'assicuratore, operando in settori di interesse pubblico richiedono un maggiore incisione della loro libertà contrattuale; quindi, l'autonomia privata è più limitata rispetto ad altri settori" (Bernal-Fandiño, 2016, p.66).

E' vicina la tendenza italiana. Come sottolineato, infatti, di fronte ad una pluralità di soluzioni ormai il giudice "non segue né la via classica di un contemperamento degli interessi direttamente implicati né quella prospettata durante la stagione ideologica dell'uso alternativo del diritto di seguire la graduatoria designata in partenza secondo una tavola di valori definita alla stregua di parametri esterni, ma utilizza semmai il riferimento ai criteri di solidarietà di cui all'art. 2 cost., come il procedimento idoneo a legittimare la soluzione più corretta, proprio in quanto capace di assorbire la conflittualità degli interessi in un contesto più ampio e generale.. in tal modo la solidarietà tende a diventare un modo d'essere dell'esperienza giuridica" (Lipari, 1997, p. 12). Questo ha portato, però, anche a decisioni controverse, tra le quali si possono ricordare le ordinanze 248/13 e 77/14 che hanno affermato la possibilità

del giudice di dichiarare nulla ex art. 1418 c.c. la caparra confirmatoria per violazione dell'art. 2 Cost. L'indirizzo, che ha aperto un ampio dibattito in dottrina sulla opportunità di applicazione diretta dei principi costituzionali, non ha trovato un unanime accoglimento in giurisprudenza.

b) SOLIDARIETA' CONTRATTUALE NELLA GIURISPRUDENZA ECUADORIANA

Nonostante la scarsità di studi recenti in materia, è possibile riscontrare una maggiore apertura giurisprudenziale al riconoscimento della solidarietà contrattuale, invocata attraverso la clausola generale di buona fede prevista nel codice civile.

Già all'inizio della fase neocostituzionalista in Ecuador, può essere riscontrata un'applicazione diffusa della buona fede nelle sentenze, connotata, però, da una adesione testuale alla norma. Ciò è dimostrato dalla sentenza n. 373-2009 della Sala civile e commerciale della Corte nazionale di giustizia del 2009. In questa decisione in presenza di un'erronea interpretazione delle norme corrispondenti ai contratti di acquisto e vendita a condizione, essa ha statuito che:

> "non avendo esplicitamente indicato il momento in cui deve essere adempiuto il secondo di questi obblighi, ovvero la celebrazione dell'atto pubblico di vendita, devono essere applicate le regole di interpretazione dei contratti, in particolare le disposizioni dell'articolo 1576 del codice civile che stabilisce che conosciuta l'intenzione delle parti contraenti, bisogna aderire ad essa piuttosto che al tenore letterale, nonché all'art. 1579 di tale codice, che stabilisce che nei casi in cui non appare alcuna volontà, al contrario, bisogna applicare la regola di interpretazione più adatta alla natura del contratto; e l' art. 1562 ibidem, norma che determina che i contratti devono essere eseguiti in buona fede, e quindi obbligano, non solo a ciò che è espresso in essi, ma a tutto ciò che deriva dalla natura dell'obbligazione, o che, per legge o costume, ne fa parte" [...] (Corte

> Nacional de Justicia, Sala de lo civil y Mercantil, R.0373-2009, f.7)

Analogamente nella sentenza n. 0228-2012, relativa ad un caso di inadempimento contrattuale di una compagnia assicurativa, si sottolinea il ruolo della buona fede, pur senza un'analisi approfondita. La Corte stabilisce quanto segue:

> [..]è anche un contratto, in cui la buona fede occupa un posto fondamentale, proprio perché l'assicurato non ha fini di lucro e perché (la buona fede) si manifesta dalla fase precontrattuale e ovviamente durante la sua esecuzione. In questo contesto, il modo in cui l'assicurato può far valere i propri diritti, reclamare e ricevere il risarcimento concordato, nel caso in cui l'evento o il reclamo si sia verificato, come la Legge stessa lo chiama, deve essere esaminato in modo speciale" (Corte Nacional de Justicia Sala de lo Civil y Mercantil, No.0228-2012, f.9).

In questa evoluzione appare rilevante il caso deciso dalla *Sala de los Civil y Mercantil de la Corte Nacional de Justicia* nel 2014 ai sensi della risoluzione n. 0199-2014. La società Prophar aveva ricorso contro la sentenza della Prima Camera civile di Pichincha per avere, senza motivazione, ridotto l'importo del risarcimento al quale era stata condannata Merck Sharp. Questo integrava un'inadeguata applicazione degli articoli in materia di danni e pregiudizi nel codice civile ecuadoriano, posto che Merck Sharp si era comportata durante le trattative con Prophar in malafede. Nell'analizzare il caso, la Corte Nacional fonda la sua motivazione sul dovere di buona fede nella fase precontrattuale attraverso anche un'analisi comparatistica:

> "nella fase precontrattuale, nella tradizione dell'Europa continentale, è imposto un dovere di condotta adeguato ai parametri stabiliti dalla buona fede, che è generalmente intesa come dovere di lealtà e cooperazione...Il riconoscimento del principio di buona fede e lealtà commerciale, non espressamente come regola di interpretazione del testo dei Principi, ma come standard obbligatorio di comportamento per

> le parti contraenti, è una delle innovazioni più grandi e di maggior successo presentate dai Principi rispetto ad altri testi di diritto uniforme [..] (Corte Nacional de Justicia, Sala de lo Civil y Mercantil, R.0199-2014, fj.46).

La Corte Nacional stabilisce, dunque, che la buona fede, in quanto principio fondamentale del contratto, deve essere presente nella fase precontrattuale e condanna la società che ha violato tale dovere. Questo caso, a differenza dei primi due, analizza la buona fede come principio che avvolge in tutto il contratto e si discosta dal metodo tradizionale adottato dalla maggior parte dei giudici ecuadoriani in materia in buona fede e solidarietà. Tuttavia esso è ancora ampiamente utilizzato e non consente una comprensione e concretizzazione efficace di queste figure a differenza di quanto avviene in Francia o in Italia. Ciò non dovrebbe significare un abbandono del metodo testualista, ma la capacità di moderarlo alla luce della situazione concreta e delle aspettative ragionevoli delle parti: la buona fede, infatti, serve a individuare quei doveri strettamente connessi al contratto e impone di evitare comportamenti volti a ledere l'altro contraente, a causare sorprese inaspettate, a minare il senso dell'operazione economica, a sfuggire a impegni presi.

Nonostante le sentenze della Corte Nacional mostrino l'uso da parte dei giudici della buona fede contrattuale nella risoluzione delle controversie, esse non costituiscono precedenti vincolanti e questo rende difficile una sua compiuta affermazione. Possono, però, costituire il fondamento per un successiva introduzione consapevole della solidarietà.

Tuttavia si nota come proprio "nei sistemi che non conoscono il vincolo dei precedenti…il decidere per valori sta come solitaria esperienza di un giudice o di una corte" (Irti, 2020, p. 145) e determina il rischio di un irrazionalismo e imprevedibilità delle decisioni. La buona fede si colloca in una ambiguità da cui "possono derivare esiti esattamente contrapposti…una sorta di orgia giurisdizionale ovvero una cautela dei giudici che può rivelarsi eccessiva in relazione al momento storico. Significativamente, le fonti romane proclamano che *bona fides quae in contractibus exigitur aequitatem summam desiderat*. E'

l'equilibrio nel decidere nella sua dimensione più intensa quello che la buona fede esige" (Castronovo, 1987, p. 29)

C) L'ECCEZIONE DI BUONA FEDE

La solidarietà contrattuale è espressione della buona fede e si concretizza nella fiducia (tutelata) che avrà luogo una trattativa "leale", che il contratto sarà eseguito e, in tal caso, il risultato finale sarà a vantaggio di entrambe le parti. Tuttavia questo non sempre avviene. In Ecuador, ma non solo, a volte l'idea del guadagno personale prevale su qualsiasi altra considerazione. Qualora il creditore possa ricavare dei vantaggi rispetto al debitore, potrebbe essere tentato a comportarsi in modo opportunistico o abusivo così da soddisfare unicamente i suoi interessi. La solidarietà tende, invece, a proibire "qualsiasi abuso che la controparte possa compiere di tale situazione (abuso del diritto, frode, uso) per ottenere un vantaggio ingiusto o iniquo (arricchimento senza causa o con una causa illegale basata sullo sfruttamento), generando una evidente sproporzione tra le prestazioni (squilibrio contrattuale, mancanza di equivalenza). Si rompe l'equivalenza tra le posizioni giuridiche delle parti e, quindi, l'equità correttiva cerca di produrre più uguaglianza", (Chamié, 2018, p.217). E' chiaro che la mancanza di cooperazione può generare abusi, sfruttamenti o approfittamenti ingiusti ed è, pertanto, fondamentale risaltare la funzione dell' "equità per cercare di ristabilire l'equilibrio rotto, ripristinare l'equivalenza (aequalitas), applicare un rimedio equo che generi uguaglianza" (Chamié, 2018, p.218).

Emblematica è la condotta tenuta nella pandemia Covid19. A causa dell'urgente necessità di maschere e guanti, alcune imprese hanno fissato un prezzo superiore a quello ragionevole. Tale condotta potrebbe costituire un abuso del diritto. In Italia, nell'applicazione della figura un momento decisivo è costituito dal caso Renault. La Corte di Cassazione argomentando alla luce dei principi costituzionali – funzione sociale ex art. 42 Cost. – e della stessa qualificazione dei diritti soggettivi assoluti, ha individuato nella buona fede "un canone generale cui ancorare la condotta delle parti, anche di un rapporto privatistico e l'interpretazione dell'atto giuridico di

autonomia privata e, prospettando l'abuso, la necessità di una correlazione tra i poteri conferiti e lo scopo per i quali essi sono conferiti. In questo caso il superamento dei limiti interni o di alcuni limiti esterni del diritto ne determinerà il suo abusivo esercizio" (Cassazione civile, sez. III, 18 settembre 2009, n. 20106) Pertanto anche l'esercizio del recesso *ad nutum* previsto nel contratto può dar luogo al risarcimento del danni se non conforme alla buona fede e alla correttezza.

Nell' ipotesi del Covid 19, le imprese erano libere di determinare il prezzo di mascherine e guanti, ma non di sfruttare in modo opportunistico e irragionevole il momento, anche alla luce della particolare fragilità economica e sociale. Infatti, come affermato in una decisione recente ricorre un abuso "quando il titolare di un diritto soggettivo lo eserciti in maniera irrispettosa del principio della buona fede, cagionando uno sproporzionato sacrificio alla controparte ed al fine di conseguire risultati ulteriori rispetto a quello per cui ha il diritto è stato attribuito" (Trib. Milano, 4.03.2020, n. 2004).

Analogamente , muovendo dalla ratio degli art. 1432 e 1467 c.c.it., nelle ipotesi nelle quali le condizioni sono radicalmente mutate a causa della pandemia, se una parte offre una rimodulazione ragionevole del contratto per fronteggiare il momento alla luce delle circostanze concrete, degli interessi di entrambi i contraenti e conforme al significato economico dell'accordo e l'altra non accetta senza opporre un rilevante interesse o giustificato motivo, può essere chiamata a corrispondere un indennizzo liquidato con i criteri tratti dal 1328, comma 1, c.c. oppure le è precluso domandare l'adempimento. Trattandosi della concretizzazione della clausola di buona fede, è necessaria, come sopra, la valutazione del caso specifico e della natura ingiustificata e abusiva del rifiuto.

Ciò non è sempre facile perché spesso la realtà mostra imprese o individui costretti a trovare modi di sopravvivere in un contesto inaspettato. Si consideri un contratto di locazione commerciale di un negozio che rimane chiuso per due o tre mesi: a fronte della difficoltà di corrispondere il canone, vi potrebbe essere una persona che ne ha bisogno come fonte di sussistenza

principale. Oppure il pagamento di una somma inferiore per le forniture, soprattutto se generale, costringe un'impresa a licenziare dipendenti o ad abbandonare linee di produzione. Una soluzione potrebbe essere, appunto, la rinegoziazione, ma non sempre porta ad un risultato effettivo. Qualora non sia avviata o fallisca, ci si può interrogare sulla opportunità di una modifica da parte del giudice. Questo potrebbe avvenire quando la differenza di posizioni fra i contraenti durante la rinegoziazione non era lontana, le parti avevano indicato nel contratto parametri di riferimento utilizzabili per la rinegoziazione, oppure — ove possibile — si possano adottare gli indici del mercato, se non sono tali da stravolgere il senso economico del contratto.

Si nota come il principio dell'abuso sia nato proprio per rispondere alla disumanizzazione del rapporto giuridico e, pur nella consapevolezza della illusorietà dell'idea che basti a moralizzare il diritto, si è rivelato uno strumento utile per rispondere all'arbitrio, all'anormalità e all'offesa al comune sentimento (Rescigno, 1965, p. 289). Tuttavia, non bisogna ritenerlo "fondato di per sé, indipendentemente da come è ricostruito e utilizzato. Tanto meno...può essere considerato un buon argomento in ragione della stigmatizzazione del comportamento da esso operata" (Velluzzi, 2019, p. 340). Sono necessarie, pertanto, sia attenzione alla motivazione e alla giustificazione del suo impiego, tentando di equilibrare le esigenze di certezza e di giustizia.

Ciò dimostra la rilevanza di un dibattito in merito al riorientamento del contratto verso i principi di solidarietà e buona fede che permetta anche di affrontare eventi che hanno indebolito significativamente economie piccole e fragili, come quella dell'Ecuador.

CONCLUSIONE

L’ordinamento giuridico ecuadoriano stabilisce il processo di costituzione, esecuzione e risoluzione di un contratto e allo stesso modo in caso di inadempimento contrattuale, generalmente determina un risarcimento completo per il creditore interessato che dipende da fattori come il tempo e la sua gravità. Non sono stati esplorati altri rimedi che si concentrino sul mantenimento della relazione.

La solidarietà contrattuale è una dottrina fondata sui principi di equilibrio e correttezza, che cerca di prevenire gli abusi delle parti e temperare, se correttamente impiegata, i rischi derivanti da una autonomia contrattuale assoluta. Il sistema giuridico ecuadoriano a livello costituzionale sembra permeabile alla introduzione della solidarietà contrattuale. Allo stesso modo, una sua limitata applicazione può essere rinvenuta nelle decisioni della Corte Costituzionale e della Corte Nacional, le quali sembrano sviluppare un sistema giurisprudenziale ibrido simile a quello americano, influenzato fortemente però dalle radici romano-germaniche.

Si osserva, però, che in America Latina, specialmente in Ecuador, le parti tendono a diffidare l’una dell’altra, cercando di sfruttare ogni possibilità di vantaggio. Ciò apparirebbe in contrasto con una visione basata sulla cooperazione. Tuttavia, questa tendenza appare essere una condizione della modernità che sta caratterizzando tutti gli Stati: si afferma una individualismo esasperato mentre “l’appartenenza comunitaria diviene fragile, temporanea e assolutamente volontaristica, perché viene meno il collante, l’idem sentire che la genera, la legittima e l’alimenta...(si) parla di <<comunità transeunti, che in un attimo si cementano e in un altro si dissolvono>>” (Di Gregorio, L., 2019, p. 74).

Non poca influenza riveste anche il fattore economico, seppure in misura minore. Il diritto comparato e la teoria dei trapianti giuridici hanno mostrato da tempo come per la corretta ed efficace introduzione di nuovi istituti, non è sufficiente esaminare il contesto giuridico, ma è necessario considerare le condizioni sociali, economiche, politiche. Questo aspetto è ancor più importante quando si tratta di una figura

come la solidarietà che è influenzata dal momento storico, dal luogo, dall'ideologia, dalla stessa situazione concreta. Pertanto l'ordinamento ecuadoriano, a livello solo giuridico, consente la possibilità di avvicinarsi al principio di solidarietà contrattuale, ma non è certa l' efficacia della figura. Sarà il tempo a dimostrare le modalità con cui dovrà essere applicata, le sue potenzialità e criticità. Si tratta di processi graduali come dimostra l'esperienza italiana che da una concezione rigida della buona fede si è aperta ad un uso progressivamente maggiore, riconfigurandola in ottica solidarista.

Tuttavia, in questo momento di crisi è necessario rifuggire da una concezione retorica della solidarietà e fondarla sull' "uomo concreto, con le debolezze i limiti le incapacità che ne condizionano l'esistenza e l'agire; sulla insistenza a riconoscerne l'autonomia e ad impedire e rimuovere qualsiasi attitudine o tentazione di farne l'oggetto o lo strumento dell'altrui attività; sulla rivendicazione della unicità ed irripetibilità di ciascun individuo, al di là di ogni risorsa tecnica e di qualsiasi scoperta scientifica che renda più agevole l'interrogarsi sul mistero della vita" (Rescigno, 2004, p. 398).

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The separation of powers in the state of exception (on the occasion of COVID-19 in Ecuador)

La separación de poderes en el estado de excepción (en ocasión al COVID-19 en Ecuador)

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SUMMARY: The article aims to analyze the principle of separation of powers in the Ecuadorian context of the state of emergency, decreed due to the health emergency caused by COVID-19. Its specific objective is to provide reasons to consolidate this principle and an adequate understanding of it, within a regime of exception. A brief introductory look at the theoretical and experiential aspects of the state of exception reveals the general suspicion of said institution. Then, from the analysis of its defining features, its regulated nature is deduced and conditioned by constitutional presuppositions. Thus, the state of exception exists and operates in observance of the principle of separation of powers. On this principle, an analytical journey of doctrinal bases consolidates the overcoming of its traditional notion towards a collaborative and dialogic opening between powers. Furthermore, the review of the minimum functions of each power of the state during the exceptional regime shows refuted the prevalence of one power over others. Already in the Ecuadorian context, a review of some specific scenarios induces the ratification of the operation of the principle of separation of powers and constitutional jurisdiction during the state of emergency. Finally, critical thinking is collected regarding the management of the pandemic, from which risks and warnings for democracy and human rights are inferred.

KEYWORDS: separation of powers, state of emergency, emergency, control of power, decision making.

RESUMEN: El artículo analiza el principio de separación de poderes en el contexto ecuatoriano del estado de excepción, decretado a causa de la emergencia sanitaria por COVID-19. Su objetivo concreto radica en brindar razones para consolidar a este principio y un adecuado entendimiento del mismo, dentro de un régimen de excepción. Una breve mirada introductoria de aspectos teóricos y experienciales del estado de excepción, permite evidenciar la suspicacia generalizada sobre dicha institución. Luego, del análisis de sus rasgos definitorios, se deduce su carácter normado y condicionado por presupuestos constitucionales. Es así que el estado de excepción existe y funciona en observancia al principio de separación de poderes. Sobre este principio, un recorrido analítico de bases doctrinarias consolida la superación de su noción tradicional hacia una apertura colaborativa y dialógica entre poderes. Además, el repaso de funciones mínimas de cada poder del Estado durante el régimen excepcional, muestra refutada la prevalencia de un poder sobre otros. Ya en el contexto ecuatoriano, de la revisión de algunos escenarios concretos, se induce la ratificación del funcionamiento del principio de separación de poderes y de la jurisdicción constitucional durante el estado de excepción. Finalmente, se recoge cierto pensamiento crítico respecto al manejo de la pandemia, del que se infieren riesgos y advertencias para la democracia y los derechos humanos.

PALABRAS CLAVE: separación de poderes, estado de excepción, emergencia, control de poder, toma de decisiones

INTRODUCTION

In the global context of the new coronavirus (COVID-19), several States, including Ecuador, declared their exceptional emergency regime in order to adopt measures aimed mainly at mitigating its spread. Under this scenario, the public management of the virus has been marked, mainly, by the restriction of presence in various activities and by the technological commitment to continue, as far as possible, the regular performance of functions.

In this context, the principle of separation of powers within the exception regime is analyzed. Then, the budget for the state of emergency and some fundamentals that give it some scepticism is first reviewed. Later, the paradigm of the separation of powers concerning the state of exception is reviewed, highlighting its most appropriate approach in order to prevent authoritarianism and the imbalance of powers during an emergency. Likewise, the functions of each power of the State are highlighted because of the role that the Executive commonly acquires in the extraordinary regime. All of which will allow us to affirm that, even in the exceptional situation, the rule of operation of the separation of powers is confirmed.

With regard specifically to the Ecuadorian scenario, seven situations provide us with examples of how powers have developed in their respective spheres, at the same time that the need for their interdependent functioning is evidenced to ensure control of power in the exception. At the same time, the fundamental role of constitutional control in this combination of the principle of separation of powers with the state of exception will be appreciated.

Given all the above, it is essential to review some critical exponents regarding the global pandemic and its treatment. Just a quick view of these approaches shows that warnings about states of exception are commonplace, especially in terms of the risks they represent for the enforcement of rights and democracy itself. This, especially considering a context of social protests that had been germinating even before the pandemic and that are expected to expand, of various kinds, in a climate of discomfort not only in health but also political, social and economic.

1. THE STATE OF EXCEPTION, AN INSTITUTION SEEN WITH SUSPICION

The state of exception consists of a legal mechanism that establishes a special regime of law, to face situations that endanger the order, of various kinds, of a community or the existence of a State itself. These situations are such that they cannot be faced or resolved by the means provided for

normal circumstances, this being the distinctive feature of this institution, which receives various names in the States. In this sense, the professor from Coimbra, José Gomes Canotilho (2003), has expressed:

> Whatever the linguistic statement [...] the constitutionalization of the state necessity regime is fundamentally redirected to the following: provision and normative-constitutional delimitation of institutions and measures necessary for the defence of the constitutional order in case of abnormality situation that, not being able to be eliminated or combated by the ordinary means provided for in the Constitution, they require recourse to exceptional means. (p. 1085)

As can be seen, since it is contemplated in a Constitution, that is, within it, the state of exception is unfailingly subject to compliance with formal, substantive and often conventional parameters (v. Gr. Art. 27 ACHR, Turku Standards, and others). Regarding their budgets, initially related to war situations and internal public order, a variety of scenarios are currently presented (humanitarian crisis, security, health, natural disasters, among others).

However, both theoretical and practical factors, given mainly during the last century, have had a decisive influence on the general consideration of the state of emergency, consolidating it as a mechanism that can be seen as high risks for democracy and fundamental rights.

On a theoretical level, we refer to Carl Schmitt's (1985) approaches, mainly to his works The Dictatorship and Political Theology. In this last, Schmitt makes the analogy of theological phenomena with legal-political ones. In this way, it assumes that, just as the miracle is necessary to explain theology, exceptionality is necessary to understand the State and the Law.

It is necessary to consider Schmitt's thesis as interpretive referents - although not the only ones - of abusive and prolonged regimes of exception. In this sense and context, the eighth thesis of the German philosopher of Jewish origin Walter Benjamin (2010) is always a reference, in his Philosophy

of History written in 1942 during the National Socialist regime, in which Schmitt actively influenced and participated:

> The tradition of the oppressed teaches us meanwhile that the "state of emergency" in which we live in the rule. We must come up with a concept of history that is consistent with this. The task of creating a proper state of emergency will then be set for us, and this will improve our position in the fight against fascism. (...). (p. 64)

Returning to Schmittian notion of exceptionality, in it, the concepts of decision and sovereignty stand out and converge. According to this author, the sovereign is the one who decides on the state of exception, whether or not the proposed case is of necessity, and how to control the situation. The state of exception is not reduced to a decree of necessity or a state of siege, but to a factual situation in which the extraordinary power of the sovereign is unlimited and requires, given the abnormality, the total suspension of the current legal order (Schmitt, 2009). When this happens, says Schmitt, "while the State subsists, the right passes into the second term [...] In an exceptional case, the State suspends the right under the right to self-preservation" (Schmitt, 2009, p. 18).

Moreover, for Schmitt (2009), the normality nothing proves, while the exceptionality all , because "not only confirms the rule, but it lives on it" (p. 20). Thus, the ultimate response to regulations must be found in the exceptional. This has led to the identification of Schmitt's conception as that of "a theorist of the exception who never bases his analysis on the normal situation, but, on the contrary, always starts from the extreme, limit case, extreme"(Herrera, 1994, p. 220).

This invocation of the exception, devoid of any legal status -being eminently decision and political scope-, calls for the establishment of a dictatorship, which is at the same time the denial of a constitutional government and rational discussion (Negretto, 1995). The disregard by the sovereign, of the other powers of the state on the occasion of the exception, is evident in The Dictatorship, when it is expressed: "politically,

any exercise of state power that is carried out immediately can be classified as a dictatorship, that is to say, not mediated through independent intermediate instances, understanding by it centralism, as opposed to decentralization" (Negretto, 1985, p. 179). It is precisely such a dictatorship that Schmitt presents as the antithesis of dialogue, which is relegated to the power of decision.

To this, it could well be opposed that the emergency constitutes a purpose and that a Constitution sets, in essence, the limits for the achievement of that proposed purpose. However, from Schmitt's perspective, such limits would be denied, since the sovereign must be free from all regulatory obstacles that hinder his full decision-making power in the emergency. This was the meaning that the German jurist gave to article 48 of the Weimar Constitution, in the last chapter of The Dictatorship, according to which the neutral power of the President of the Reich and the defence of the Constitution, were resolved in the person of the dictator.

In different proportions, several of these postulates have seen the light in the emerging praxis of States during the 20th century. Under those, it has been tried to justify the concentration of decision-making power in a single person, in ignorance of all kinds of control during the emergency.

Indeed, all the discredit that falls on states of exception is not due to Schmitt's thesis. On a practical level, several cases regarding events raised under exceptional regimes have added to this suspicion. In Latin America, this took place during the last three decades of the 20th century, in which the Annual Report of the Inter-American Commission on Human Rights for 1980-1981 is illustrative, where the concern of the organism regarding the states of emergency declared in several countries of the continent:

> [...] However, in practice, many times, these states of emergency have been dictated without the circumstances justifying it, as a simple means of increasing the discretion of the exercise of public power. This contradiction is evident when the public

> authorities themselves affirm, on the one hand, that there is social peace in the country and, on the other, they establish these exceptional measures, which can only find justification in the face of real threats to public order or security of the state.
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> Even more severe is the establishment of these states of emergency indefinitely or for a prolonged period, especially when they grant the Head of State such a wide range of powers, including the inhibition of the Judicial Power regarding the measures decreed by him, which can lead, in some instances, to the very denial of the existence of the rule of law.
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> At the time of approval of this report, several American States had decreed these exceptional measures, although to varying degrees and assigning powers to the Heads of State that vary from country to country. [...] (GS/OEA, 1981)

Those decades were marked by de facto regimes and actions by the security forces that led to subsequent declarations of state responsibility by the Inter-American Court. Just to mention a few, there are the judgments of the cases Neira Alegría and others v. Peru (1995); Durand and Ugarte v. Peru (2000); Montero Aranguren and others (Detention Center of Catia) v. Venezuela (2006); Almonacid Arellano and others v. Chile (2006); Zambrano Vélez and others v. Ecuador (2007); J v. Peru (2013); García Lucero and others v. Chile (2013); Yarce and others v. Colombia (2016).

It should be noted that, even under the return to democracy and in periods of relative political stability in the region, the states of exception persist under a particular sceptical eye. As an example of this, it is common to find immediate warnings, reminders and follow-ups that national and international bodies, mainly those of human rights monitoring, present as a result of the declarations of exception.

2. STATE OF EXCEPTION AND POWERS OF STATE: *EXCEPTIO FIRMAT REGULAM*

The readings that question the states of exception tend to focus on the habit of their declaration and its prolongation. However, a common problem often goes unnoticed: that of the functioning of the powers in the context of the exception.

The practice has implanted in the legal-political imaginary, a scenario of the prevalence of a single power -usually the Executive- over the others, in the handling of crises.

At first sight, it seems reasonable that, in a scenario of crisis or shock, good leadership and determination is required to act immediately. This generally falls to an authority empowered to declare and direct the exceptional regime. Hence, in extraordinary circumstances, an exception to the ordinary management of power is also allowed, placing control of the situation in a single function of the state.

However, such reasoning, no matter how logical it is, is based on an undemocratic basis that does not differ from approaches such as Schmitt's and that is, by default, contrary to constitutionalism and violates the principle of separation of powers. Below we will point out three considerations tending to justify the persistence of the balance of power and the separation of powers during the state of emergency, but not before making a brief clarification of terminology.

Without wishing to ignore their theoretical and terminological differentiation, for practical purposes we will refer indistinctly to the terms separation and division, as well as powers and functions[1]. Then, referring only to the principle of

1 Taking the legislative, executive and judicial functions as functions, Duverger (1962) warned: the distinction of functions should not be confused with the separation of powers; the first refers to a division of government burdens; the second tends to make each category of State organs (Executive, parliament) independent of each other (p. 154). For Hauriou (1927), the functions of the state are the various activities of the government company, considered according to the guidelines that state ideas print them (justice, legislative, governmental and administrative); while the powers public, are the various forms of power used by the state-company to carry out its functions (Executive, legislative and suffrage) (pp. 372-374).

separation of powers, these being the Executive, the Legislative, the Judicial and the Constitutional Control. However, we start from a conscious attitude regarding the evolution that this principle has undergone:

> The "horizontal and tripartite division of State powers and functions" has not only been transformed into practically another, the modern constitutional organization but has also been replaced by a plurality of too complex rules and principles, complementary to each other. in the work of controlling and limiting power. (García Roca, 2000, p. 66)

2.1 The State of exception is provided within and not outside the Constitution

In the first place, the state of exception is contemplated and allowed by and within the Constitution. For this reason, both the magnitude of the action and its scope are normatively foreseen, not allowing any preposition of the political and the factual over the existing regulations.

Thus, granted according to constitutional parameters, the state of exception operates under the presuppositions of the constitutional State of law, including the division of powers, a principle that persists even during the emergency.

The persistence of the division of powers during the emergency implies that each power conserves its respective faculties and avoids, at all costs, an imbalance under the pretext of the exception. Thus, we find that "even in crises the rule of law tries to preserve a true balance between the different powers of the State, for which it pre-establishes certain operating rules that seek to prevent their concentration" (Despouy, 1999, p. 67).

Although the public management of the emergency includes the more significant role of one power before others, precisely to avoid free action and concentrated decision-making, limits are set on the state of exception and the active participation of all powers is foreseen, constituting these in necessary instances -not optional- of deliberation and decision.

From this perspective, an attempt has been made to correct that normalized imbalance in favour of the Executive, illustrated as follows:

> (...) The emergency is cruel because it alters institutional roles. It is made for the Executive because it is the only one who arrives on time. The Legislature endorses it. The Judicial sometime corrects it in its effects. We cannot blame the presidential regime for its leadership in an emergency. It is made for that, but it does not mean that the emergency authorizes it to run over the balances created by the constitutional culture. (Frías, 1992)

Therefore, it would be inconceivable the provisional abolition of the distinction of powers that Giorgio Agamben (2004, p. 18) has considered the essential character of the state of exception. Instead, we can speak of a reaffirmation of powers and their operation. This leads to establishing that a state of exception and separation of powers are not exclusive concepts. The Ecuadorian constituent seems to have understood it in this way when it established that the declaration of the state of the exception does not interrupt the activities of the functions of the State (CRE, 2008, art. 164).

2.2) It is necessary to overcome the traditional notion of the separation of powers for a state of exception

Second, it is worth highlighting the notion of separation of powers to be combined with a state of exception.

Assuming that there is only one state power, whose will be manifested through organs fulfilling various functions, the argument for the separation of powers as a division of labour in decision-making is feasible (Greppi, 2013). The traditional notion of the separation of powers understands that division of labour under a logic of non-interference, where each power specialized in its functions acts strictly separated and isolated from the others. A state of exception carried out under such a traditional notion could allow outbreaks of authoritarianism and sovereign decisionism in a Schmittian key, according to

which a single power would exclusively manage the entire crisis, without controls and according to its sole criteria.

In the first half of the 20th century, a broader sense of the separation of powers was advocated. For example, according to Kelsen (1974), the constitutional balance is maintained only under the meaning of the principle of separation of powers seen as a division of the same, which indicates the distribution of power between different organs, not so much to isolate them, but to allow a common control of one over the other, preventing the concentration of excessive power in a single organ.

For their part, French advertisers postulated reflections based on their national experience. Duguit (1996), despite the limitations he considered for the Judicial Power, emphasized that an absolute division would fatally lead to the concentration of all powers in one: “To place at the head of the State two powers without link between them, without interdependence, without solidarity, it is fatally condemning them to fight” (p. 132). He criticized the National Assemblies of 1789 and 1791 for their incorrect interpretation of the work The Spirit of the Laws, reproaching them for not having seen that Montesquieu “shows, with crystal clarity, that intimate solidarity, that a constant collaboration must unite the different powers of the State...” (Duguit, 1996, p. 14).

Likewise, faced with Montesquieu’s premise, that because of the necessary movement of things, powers need to march in agreement, Hauriou (1927) proclaimed: “March in agreement, what is it but to collaborate?” (p. 379). Equal place in Duverger (1962), which differentiated the regime of the collaboration of powers -from those of confusion and separation- by three aspects: distinction, organic dependence and functional collaboration. Such functional collaboration will exist “when two organs act in concert to produce the same act” (Duverger, 1962, p. 193).

Such principles of collaboration and solidarity between powers would weaken the traditional notion of strict and absolute separation, even transcending the checks and balances control system. Thus, the principles mentioned above are

essential for the required model of division of powers during a state of emergency, because they avoid centralized and hasty decision-making and offer conditions for all possible voices to be heard, including those of potentially affected parties.

As we can see, the critical approach points to the deliberative system, which, in the words of Professor Roberto Gargarella (2014), requires a logic of institutional organization different from that offered by the system of checks and balances: "While the traditional system of checks and balances [...] is aimed at avoiding and channelling social war; a dialogic system requires orienting itself towards other purposes, in such a way as to organize and facilitate an extended conversation and between equals " (p. 125).

Of course, the urgency that distinguishes a state of exception does not conceive the possibility of a broad dialogue in all its dimensions; however, this does not mean giving up its realization at any time. For this reason, it is forced to accept without further ado the idea that "deliberation that postpones the decision leads to chaos, aggravates the crisis, suspends the moment of sovereign political decision-making by the one who has the powers to do so" (Bercholc, 2014, p. 211). Furthermore, it is that going to deliberative instances means instead, in terms of efficiency, saving time and resources, since the rethinking and reopening of dialogues and ways that were initially avoided are mostly prevented.

2.3) There are minimum requirements for each power of the State during the emergency regime

Finally, there are minimal aspects of the participation of the powers during states of exception, beyond the legal regime that each State provides and the basic guidelines for observance for such circumstances (e.g. parameters on judicial guarantees and legal procedures not to be suspended during states of emergency, OC-8-87 and OC-9-87 I / IACHR).

In the first order, the current performance of the functions of each power is entrusted to the logic of adaptability to the circumstances of the case and to the extent that this

is possible. In this regard, in Ecuador, Under the COVID-19 context, executive and legislative sessions have taken place both virtually and in-person under security protocols. Similarly, the Judiciary and the Constitutional Court they continued to dispatch causes and audiences, through virtual media that were reinforced and created for this purpose.

As indicated above, in the Ecuadorian case, the declaration of the state of the exception does not interrupt the activities of the State functions (CRE, 2008, art. 164). However, in general terms, it is worth highlighting a minimum required function of each power of the State during the exception.

The power with the most significant decision-making power in the emergency, which is generally the Executive, is expected to exhaust, to the extent of the pressing circumstances, a dialogue before the preparation and adoption of measures. This offers the possibility of presenting a more elaborate proposal, if desired, before the examination and control of the other powers.

Likewise, the Legislative Power expects optimal collaboration of benches, parties or groups within it, through a more simplified deliberative process than usual. This requires placing specific salable differences based on a common goal. Moreover, of course, from the Judicial Power and the Constitutional Justice, the most excellent protection of the legal and constitutional order and mainly of rights is expected, remembering that the state of exception is always developed, inescapably, following the Constitution.

Nevertheless, it is necessary to clarify the Judicial Power and the Constitutional Justice, in terms of not becoming an obstacle within a legitimate emergency. In this sense, controlling does not always mean denying. Argentine professor Carlos S. Nino (1997) argued that on many occasions, the optimal form of judicial intervention is not that of a total invalidation of an unconstitutional norm, nor that of an administration decree:

> Judges do not always need to rule out the results of the democratic process to promote measures that they believe are more conducive to the protection or

> promotion of rights. Instead, judges can, and should, adopt measures that promote the process of public deliberation or more careful consideration by political bodies. (p. 292)

In this way, it is mostly ensured that the authorities collaborate and exhaust, as far as possible, the much-needed dialogue in emergencies.

So far, we have offered reasons under three parameters tending to reaffirm the division of powers as an unalterable and unavoidable principle during the emergency regime. For this reason, the logic that postulates “for exceptional circumstances, also exceptional remedies”, is not understood in an absolute way, since the exception must function only within and under the Constitution and therefore, respecting its canons and fundamental principles, in those, the separation of powers. This was illustrated by an old ruling of the Supreme Court of Justice of the Argentine Nation (1927):

> That the Constitution is a statute to regulate and guarantee the relations and rights of the men who live in the Republic both in time of peace and in time of war and its provisions could not be suspended in any of the great emergencies of a financial or economic nature. Another order in which governments might meet. The enactment of a law, even an emergency law, therefore presupposes its submission to the Constitution and the public and administrative law of the state as soon as it has not been repealed [...]. (Court decision: 150: 150).

3. OVERVIEW OF THE ISSUE IN ECUADOR: STATE OF EXCEPTION AND COVID-19.

Approximately half a century ago, the exceptional regime began to be entrusted to the Executive, in the particular person of the President.

> [...] The constitutional regulation of states of exception was substantially modified in the 1978 Constitution which, taking into account the doctrine of national security, transferred to the President of the Republic,

> as the highest authority of the public force, the power to decree the measures extraordinary. (Aguilar, 2010, p. 63)

Since then and under the presidential roots, it was clear the identification of the exceptional sphere with the orbit of the Executive. Note the notion expressed by Julio César Trujillo (2006):

> States of exception are situations in which the Executive Power cannot save external security or public order with the ordinary powers that the Constitution and the laws attribute to it and, therefore, it needs extraordinary powers for effect until the dangers are conjured. (p. 202)

However, at the same time, the regulation of emergencies in Latin American legal systems was gaining ground, to the point of consolidating a tendency to "increasingly limit the powers of the Executive itself, through the intervention of the legislative chambers, but also with the participation of jurisdictional bodies through the instruments of judicial review of constitutionality " (Fix-Zamudio, 2004, p. 822).

In Ecuador, this trend took full force with the 2008 Constitution, by imposing brakes on the faculties and powers of the Executive for the state of exception. Thus, the Legislative Power can revoke the decree declaring exception at any time; the Constitutional Court formally and materially controls the declaration of exception, the measures to be adopted, and monitors the emergency; and, in the same way, the judiciary knows and resolves jurisdictional guarantees in the event of an emergency.

Regarding COVID-19, the President of the Republic, by executive decree No. 1017 (2020), declared a state of exception for sixty days throughout the national territory for reasons of public calamity. The decree reminded all the functions of the state, mainly the judicial, to maintain the respective inter-institutional coordination during the validity of the state of exception. The declaration obtained a favourable opinion from the Constitutional Court (No. 1-20-EE/20), making essential

clarifications on the respect and protection of people living on the street and vulnerability, on the right to privacy, the regulation of the use of the public force, the closure of borders and the suspension of flights, among others.

Subsequently, by executive decree No. 1052, the state of exception was renewed for another thirty days. The Constitutional Court gave a favourable opinion (No. 2-20-EE/20), emphasizing rights and guarantees in the areas of health, education and connectivity, violence against women, indigenous peoples, work, human mobility, access to information, free expression and public protest, people deprived of freedom and transparency, corruption and responsibility of public servants.

In this emergency context, some events confirm the relevance of the constant functioning of the powers of the State during the emergency regime. To name a few:

a) The President of the Republic sent to the National Assembly an urgent economic bill (Humanitarian Support Law), of controversial labour, economic and tax measures. On the eve of the end of the term to pronounce and a tacit acceptance configured, the Assembly ended up approving the project with several modifications. In the same way, the bill for the regulation of public finances was sent, also approved on the eve of the expiration of the term, with various adjustments and modifications. Both projects returned to the Executive for their objection or sanction. Regardless of sharing the result of these projects, it should be recognized that the Legislature has met, discussed, and pronounced its positions, mostly holding back the original will of the Executive.

b) Once the emergency was decreed, the Plenary of the Judiciary Council resolved to restrict the attention to the public and the filing of actions, except in the judicial units with competence in matters of flagrante delicto, criminal, domestic violence, traffic, in addition to multicompetent units and criminal guarantees (Res. No. 028-2020). Immediately, the Constitutional Court, through a follow-up order, reminded the Council of the Judiciary, its decentralized bodies and the judges with competence to hear judicial guarantees, that

access to constitutional justice cannot be restricted, nor the adequate protection of constitutional rights in the context of the COVID-19 health emergency. This timely control of constitutional justice allowed the prompt reopening of courts,

c) In the framework of the state of exception, constitutional actions and a follow-up phase have been presented regarding the budget reduction in education. The Executive, from its finance ministry, has presented to the Constitutional Court the reasons why it considers the reduction as a consequence of the economic crisis aggravated by the pandemic.

This is another example of how constitutional justice could mean a brake on the decision-making power of the Executive during the exception. These processes make it possible to ensure the justification of such budgetary measures and that those potentially affected are heard. Furthermore, it is that by their nature, the economic measures adopted in an emergency, even more so, require judicial control. In the words of Professor Juan Vicente Sola (2016):

> The notion of economic emergency is a surrender of judicial control to guarantee economic freedoms because once the existence of a crisis is established, Congress and the Executive are granted broad freedom to regulate economic life. Generally, the activity carried out by the political powers has aggravated the situation that it was trying to remedy. The answer to this problematic situation is the reestablishment of judicial control in defence of economic freedoms in the same way that it is carried out in the case of civil liberties. At the same time, the recognition of due economic process or economic reasonableness as a form of adequate control of the decisions taken by the political powers during the emergency. (p. 520)

d) The Ministry of Defense issued Agreement No. 179, by which it updates the Regulations for the Progressive, Rational and Differentiated Use of the Force by the members of the Armed Forces in situations of internal social resistance. In that, a rational scale of the use of force is established according to five levels.

The agreement arose in the context of several citizen protests guided by various reasons, from the lack of labour and health guarantees for medical personnel, layoffs in various sectors, reduction of the education budget, lack of payment to teachers, doctors and other professionals and servers, even the increasingly frequent cases of corruption revealed.

Some actions have been brought against this agreement and will undoubtedly constitute a valuable opportunity to control the decisions made by the Executive Power in the emergency.

e) Countless cases of corruption revealed, during and on the occasion of the emergency, have set the powers of the state in motion, especially the judicial function as the main protagonist in the investigation and prosecution of the alleged participants, ranging from individuals, private companies, public servants, even elected officials.

f) On June 15, 2020, by executive decree No. 1074, the President of the Republic declared a new state of exception for sixty days. To the cause of the public calamity, this time, the economic emergency supervening to the health emergency was added. The Constitutional Court gave a favourable opinion (No. 3-20-EE / 20), which this time was not unanimous, as there were two concurring votes and three saved. The statement highlights the non-consideration of the economic emergency as a cause for establishing and maintaining a regime of exceptionality, as well as the coordinated work requirements of the different functions of the State and local authorities, and to resort to institutionalized deliberative processes.

Thus, this passage, through the Constitutional Court, as an instance of control of power, shows the importance of the dialogic interaction between the powers before making decisions in the context of an emergency.

g) On August 14, 2020, through executive decree No. 1126, the President of the Republic declared a new state of exception for thirty days, due to public calamity due to the pandemic caused by COVID-19. Being declared its constitutionality by opinion (No. 5-20-EE / 20), the Plenary of the Constitutional Court, unanimously, anticipated that once the period of thirty days of renewal has elapsed, it will not admit a new statement on the same facts that have constituted public calamity on two previous occasions with their respective renewals. As such, it set parameters for national and sectional authorities to gradually transition to an ordinary regime capable of facing COVID-19.

In this way, the Constitutional Court, in a conscious attitude for not normalizing the exceptional regime, has taken a decisive step in calling on both the central government and the local authorities to put into operation the ordinary regulations that exist, giving introductory provisions of order to face the pandemic, without the need to invoke an extraordinary regime.

These seven examples reflect the importance of maintaining and ensuring the average performance of the powers of the State during states of exception. The main reason is that its effective functioning prevents all forms of authoritarianism, on the part of the power with greater decision-making power in the crisis and guarantees a conversational dynamic as a prior filter of the decisions to be adopted. Meanwhile, constitutional justice shows the relevant role of being the foremost interpreter and guardian of the Constitution, setting the determining parameters and mandatory observance for states of exception.

4. RISK OF REGRESSION: A SCENARIO ALREADY KNOWN BUT OF NEW MAGNITUDES

Philosophical thought has been vindicated within the COVID-19 context, questioning the paradigms that permeate various parameters of normality in our societies.

By March 2020, while the South American States, some earlier than others, began to prioritize the pandemic and while Europe was already facing it in all its dimensions, Wuhan Soup (2020) was published under the initiative of the editorial ASPO (Preventive and Compulsory Social Isolation). In this work, Contemporary thoughts are piling up around COVID-19 and the realities it brings. A month later, the publisher released a second volume entitled The Fever (2020), this time from Argentine thinkers.

Wuhan soup and *The Fever* gain relevance by inserting, from a multi and interdisciplinary approach, a common concern around states of exception in the management of the health crisis. Thus, Agamben distrust declarations of a state of exception, because they have become a standard paradigm of state government. According to Berardi, we have entered the era of biopolitics, where presidents can do nothing. López Petit warns that governments are re-nationalizing, decisionism coming to life again. For his part, Byung-Chul Han warns that on the occasion of the closure of borders, the state of exception is strengthened under the old idea of sovereignty. Nevertheless, perhaps the most subtle reflection, in a Latin American key, is offered by Maristella Svampa (2020):

> On the other hand, the sanitary Leviathan is accompanied by the State of Exception. Much has been written about this, and we will not elaborate. Suffice it to say that the most significant social controls are made visible in different countries in the form of violation of rights, militarization of territories, repression of the most vulnerable sectors. In reality, in the countries of the South, rather than an Asian-style digital surveillance society, what we find here is the expansion of a less sophisticated surveillance model, carried out by the

> different security forces, which can hit even more to the most vulnerable sectors, in the name of the war against the coronavirus.
>
> A question resonates all the time. How far do the States have broad shoulders to continue in the key of social recovery? This is something that we will see shortly, and in this future, social struggles will not be alien, that is, movements from below, but also the pressures exerted from above by the most concentrated economic sectors [...] (pp. 20, 21)

The reflections mentioned above converge in two warnings: 1) of the return to the abuse of states of exception, marked by authoritarianism and violations of rights, under the pretext of the health emergency; and, 2) the imposition of economic measures and programs outside of any consensus, even when this implies exerting force to eliminate everything considered as an obstacle. Such scenarios were already experienced, to varying degrees, in various countries of the region, particularly during the 1970s and 1980s.

These warnings also reveal the adverse effects of a state of exception, by which popular sovereignty would be affected, the process of depoliticization of which current society is a victim would be potentiated and where democratic dialogue would be replaced by authoritarian monology. This is how Rafael Valim (2018) highlights it, as one of the most distinctive features of the state of exception:

> The conception is subverted that any authority - administrative, legislative or judicial - is a mere administrator of the people and, therefore, must act within the limits of the Constitution and the laws, opening a dangerous space for voluntarism, what constitutes, by the way, the genealogical sense of the state of exception. (p. 444)

The circumstances described threatening the return of authoritarian decision-making models, with absolute disregard for the citizens and the control bodies themselves. Added to this is the concern about a growing government endorsement

by the public force in the face of dissidents and manifestations of disagreement. In this context, an internal enemy is usually created and configured discursively, from the central power, identifying it with anyone who destabilizes or obstructs what has been indicated - and promoted - as the only way to face the crisis.

Undoubtedly, the economic and fiscal impact caused by the stoppage of activities, due to COVID-19, requires the taking of urgent measures. However, a very different thing is the use of the exception scenario to establish, in the name of the emergency, an entire economic model that will endure from now on without previously evaluating the consequences it may entail. Anne Klein (2016) has warned, with numerous examples of state experiences, that the upheaval is a propitious moment to establish a new type of government or to implement economic decisions:

> However, if we are hit by an economic crisis of sufficient severity - a rapid currency depreciation, a market crash, or a significant recession. Crises are, in a sense, zones «ademocratic», parentheses in habitual political activity within which consent or consensus does not seem to be necessary. (p. 194)

It should be noted that all these risks are in direct contradiction with the foundation of the state of exception, which in the words of Pérez Royo (2005): "makes no sense except to return to normality. Consequently, every right of exception has to be valued from this perspective" (p. 1078). For this reason, the full and vigilant operation of the state powers, including the constitutional jurisdiction, during and after the health emergency cycle becomes imperative. This is the only way to control any attempt to impose non-consensual agendas and programs, even when these involve new means of force and surveillance.

CONCLUSIONS

Intended to rule legally in specific circumstances of abnormality, the state of exception is an institution of law and not, as Carl Schmitt considered, a purely political sphere devoid of legality. This means that it is subject to the constitutional parameters that determine its formal and material validity, which is why it is not correct to conceive that the state of exception works outside the Constitution. For this reason, it is explained that during the state of exception, the principle of separation of powers is reaffirmed as immovable, in order to avoid any trait of decisional authoritarianism.

That the circumstances that motivate the declaration of exception require urgent and effective decisions does not imply that one power prevails over the others. For this, it is necessary to overcome the traditional notion of absolute separation, through collaboration, joint work and deliberation between the powers, to avoid their concentration during the exception. Under this approach, a minimum of optimal performance is expected from each state power.

In the Ecuadorian context, the State of the exception does not interrupt the activities of the State functions. The powers recognized to the Legislative and the Judiciary, without prejudice to constitutional justice, encourage to avoid the accumulation of power and the solitary and uncontested decision-making by the Executive. In particular, the control exercised by the Constitutional Court has been decisive in reminding the State powers of elementary respect for fundamental rights and democratic institutions.

Finally, the uniqueness of the COVID-19 pandemic and its treatment by governments, invites careful monitoring of the exception regimes concerning the imposition, without any consensus, of programs and measures of a political nature-economic in the name of the emergency and the application of innovative mechanisms of control and force.

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